Supreme Court, U.S.
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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1996

CONSUMERS EDUCATION & PROTECTIVE ASSOCIATION, AND LANCE HAVER,

Petitioners,

v.

PENNSYLVANIA MILK MARKETING BOARD, LEHIGH VALLEY DAIRIES, INC., ATLANTIC DAIRY COOPERATIVE, PENNSYLVANIA ASSOCIATION OF MILK DEALERS, ROSENBERGER'S DAIRY, INC., CLOVER FARMS DAIRY, AND WAWA DAIRY,

Respondents.

On Petition For A Writ Of Certiorari To The Commonwealth Court Of Pennsylvania

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does a state law violate the commerce clause of the U.S. Constitution because it requires that milk prices in Pennsylvania be set no lower than the costs of the average in-state supplier (plus a legally guaranteed, supra-competitive profit), so that out-of-state suppliers who can provide the product more cheaply and efficiently than the above-market average in Pennsylvania are outright prohibited from utilizing that natural efficiency to compete against less-efficient Pennsylvania providers?

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PETITION FOR A WRIT OF CERTIORARI

Consumers Education & Protective Association and Lance Haver respectfully petition for a writ of certiorari to review the judgment of the Commonwealth Court of Pennsylvania in this case.

OPINIONS BELOW

The opinion of the Commonwealth Court (App., *infra*, 1a-19a) is reported at 683 A.2d 972. The order of the state supreme court denying discretionary review (App., *infra*, 20a) is reported at 694 A.2d 625. The order of the Pennsylvania Milk Marketing Board (App., *infra*, 21a-43a), from which appeal was originally taken, is unreported.

JURISDICTION

The Pennsylvania Supreme Court entered its order denying discretionary review on May 23, 1997. (App., *infra*, 20a). Certiorari jurisdiction lies in this Court pursuant to 18 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

At issue is the constitutionality under the commerce clause of the United States Constitution, Art. 1, Section 8,

cl. 3, of the Pennsylvania Milk Marketing Law, 31 P.S. § 700j-801.

STATEMENT

A. The Milk Marketing Law and Its Effect

Pennsylvania's Milk Marketing Law, 31 P.S. § 700j-801, mandates that the Pennsylvania Milk Marketing Board (PMMB) maintain minimum retail prices paid by consumers to milk processors (who buy the milk from farmers at federally-set prices). The consumers in question here – the two hundred thousand-plus children attending the School District of Philadelphia (SDP) – are, for the most part, economically disadvantaged. At least eighty-four percent are children from low-income families who qualify for fully-subsidized meals under the federal school breakfast and lunch programs. R. 293a. At least another six percent qualify for highly subsidized meals because of their low incomes. R. 294a. As a result, over 90% of the milk purchased by the School District of Philadelphia is *given* to children near or below the poverty line, and 99.95% of the School District's milk purchases are for purposes of the school breakfast and lunch programs. R. 256a.

Under these programs, half-pint cartons of milk are federally required elements of every meal platter served. For each such platter, moreover, the federal and state governments pay a fixed reimbursement. This means that the half-pint prices mandated by the PMMB – about 3-2/3 cents higher than what the School District could obtain them for in the free interstate market – needlessly

increase the cost of providing the federally and state mandated breakfasts and lunches above the normal costs incurred by school districts virtually everywhere else in America. This higher cost does *not* result in a higher reimbursement – it necessarily must either result in less food and nutrition for every Philadelphia school child, or else be absorbed by the School District, producing less education for Philadelphia's kids.

SDP's current milk distributor, Balford Farms, currently distributes exactly the same milk from exactly the same plants to wealthier, suburban New Jersey schools for four-cents-per-half-pint-carton less than the price it must charge the Philadelphia schools. R. 288-89a & 291a. This is due *solely* to the PMMB's minimum price requirement: Absent the PMMB regulations, SDP could obtain its milk at the same, or approximately the same, price as do school districts in other states. R. 266-68a. This would result in a saving to the School District and its taxpayers of approximately one million dollars per year. R. 281a.

In fact, whenever the School District of Philadelphia has solicited bids from milk distributors in the last half-dozen years, **every** bid received has been precisely at the PMMB-established "minimum" price. R. 263a. In other words, the PMMB mandated "minimum" is set at a level at or above the *maximum* price any supplier would conceivably charge in a free market. School milk prices in Philadelphia, mandated by PMMB, stand as much as 40% higher than those in any neighboring state, R. 261a, 272-73a (Philadelphia, 18¢; Wilmington, DE, 13.75¢; Brandywine, DE, 13.49¢; Trenton, NJ, 13.3¢; Cleveland, OH, 13.78¢; Arlington, VA, 13.99¢).

Milk distributors in business in both Pennsylvania and New Jersey will provide milk to the School District of Philadelphia at or near the same prices at which they provide the same milk only a few miles across the river in New Jersey – a rate substantially lower than that now required by the PMMB – if only Pennsylvania's current above-market-price requirement were lifted. R. 266-68a. They are statutorily denied the ability to do so, however, by the Milk Marketing Law, which intentionally "isolate[s] [the state's] own economy," *H.P. Hood & Sons v. Du Mond*, 336 U.S. 525, 526 (1949), from the real pressures of interstate commerce and the national market for milk.

First, the state law in question provides, in fixing a minimum price, "the board shall utilize available information concerning producers' cost of production and a cross-section representative of producers, dealers and stores in the area." 31 P.S. § 700j-801. Thus, under state law, "the Commission should not select the most efficient . . . producers or dealers in the milk districts, or areas, under consideration, upon whose figures or investments and costs to conclude what a fair return should be." *Colteryahn Sanitary Dairy v. Milk Control Commission*, 332 Pa. 15, 27 (1938). In fact, in practice the PMMB insists upon using above-average, high-cost dealers' costs to calculate the mandated minimum price. R. 489a. Thus, even PMMB's own staff expert testified that "we think that [demand for] milk is relatively inelastic and thus the price [set by PMMB] is exorbitant." R. 470a.

Second, and more importantly, this inflated average price is derived by reference to *only* local producers. See 31 P.S. § 700j-801 ("producers, dealers and stores *in the area*) (emphasis added).

This law therefore has a substantial effect on interstate commerce. In contrast to the early 20th Century, when such milk pricing laws were first enacted and the market in milk, a perishable commodity, was almost wholly local in nature, "[c]hanges in transportation and refrigeration of milk have led to less dependence on local milk supplies and milk is sold and distributed on a multi-state basis." *Morton v. National Dairy Products Corp.*, 287 F. Supp. 753, 755-56 (E.D. Pa. 1968). Thus, the Pennsylvania courts recognized over a decade and one-half ago that "a substantial amount of inter-zone movement of packaged milk exists between . . . Area 1 [the Philadelphia area] and out-of-state. [One] witness stated that at least 29.2% of the milk sold in [suburban Philadelphia] was processed in [Philadelphia], and 11.6% was processed out-of-state. More interestingly, . . . fully 55.4% of the milk . . . is distributed outside the state." *Lily Penn Food Stores v. Milk Marketing Board*, 437 A.2d 485 (Pa. Cmwlth. 1981). The court concluded that "[d]ealers or handlers marketing milk in an area subject to Pennsylvania law, whether located there or out-of-state, are directly affected by price-setting orders." *Id.* at 489.

In Southeast Pennsylvania in particular, witnesses for the Respondents in this case conceded, "there is significant out-of-state pressure, price pressure," R. 476a. "Area 1 is a highly competitive area and that New Jersey influence should not be overlooked," R. 489a, "especially in small container[s]," R. 459a, the type sold to schools for their students. Pennsylvania's continued attempts to control and restrain "that New Jersey influence" and other interstate competitive pressures, to the detriment of consumers, including Peititoners, are the issue here.

B. Proceedings Below

In the fall of 1994, in an attempt to save the aforementioned approximately $1 million per year in milk costs, the School District of Philadelphia (SDP) filed a federal lawsuit challenging the Pennsylvania minimum milk price system as unconstitutional. See *School District of Philadelphia v. Pennsylvania Milk Marketing Board*, 94-CV-5656 (E.D. Pa. Sep. 14, 1994). Shortly after SDP filed its suit, Lehigh Valley Dairies, Inc., one of the largest milk processors in the state and the processor of all the milk purchased by the School District of Philadelphia, filed a petition with the Milk Marketing Board seeking a state-mandated price increase targeted especially at increasing the price of milk sold in half-pints – of which, not coincidentally, the School District of Philadelphia is the largest single purchaser and consumer in the state. The school district therefore dropped pursuit of its federal litigation to concentrate its resources on fighting this apparently-retaliatory attempt by in-state milk dealers to obtain a *further* price increase from PMMB in school milk prices.

After hearings on the petition for new prices stretching over four days throughout the summer of 1995, and briefing by all interested parties, including SDP, the Consumer Education & Protective Association (CEPA), and Lance Haver (a milk consumer, taxpayer, guardian of a child in the Philadelphia schools, and education director of CEPA), the Board posted OGO A-890 on September 22, 1995. This Order, *inter alia*, established minimum resale prices for half-pints of milk approximately 1-1/3 cents below the levels requested by the milk-producers, but approximately 3-2/3 cents above the market level. The

School District and the Petitioners here therefore sought reconsideration, as did the milk dealers.

On October 20, 1995, the Board posted an amendment to OGO A-890 ("OGO A-890 AMENDED"), which did not affect the half-pint price set in OGO A-890 for sales specifically to *schools*, but contained various readjustments of other prices negotiated between PMMB and the milk dealers to compensate for revenue the dealers contended they were losing by acceding to the lower-than-requested inflated price for schools. The arguments raised by the School District for *lower* prices were not addressed at all.

On October 23, 1995, SDP, CEPA and Haver filed a Petition for Review of OGO A-890 in the Commonwealth Court of Pennsylvania, challenging the evidentiary basis for PMMB's price determination, the propriety of the price-setting proceedings under the due process clauses of the U.S. and state constitutions, and the constitutionality of both the Order and the underlying Milk Marketing Law under the commerce clause of the U.S. Constitution. Several of the industry-related parties from the agency proceeding intervened as respondents. PMMB and the respondent-intervenors filed an initial procedural challenge to the appeal, which was overruled by a chancellor of the court.

On October 18, 1996 the Commonwealth Court affirmed OGO A-890, rejecting all of Petitioners' arguments. President Judge James Gardiner Colins dissented without opinion.

Petitioners filed a Petition for Allowance of Appeal with the Pennsylvania Supreme Court on November 15, 1996. On May 23, 1997, the Pennsylvania Supreme Court denied Petitioners' Petition for Allowance of Appeal *per curiam*.

This Petition for a Writ of Certiorari to the Pennsylvania Commonwealth Court follows.

REASONS FOR GRANTING THE PETITION

I. THE STATE COURT'S OPINION MISCONSTRUES AND CONFLICTS WITH DECISIONS OF THIS COURT AS WELL AS THOSE OF SEVERAL LOWER FEDERAL COURTS, AND AGGRAVATES THE EXISTING SPLIT BETWEEN THIS COURT'S DECISIONS AND THOSE OF THE THIRD CIRCUIT

The state court held that the Pennsylvania law imposed only an "indirect burden" on interstate commerce, and did not explicitly discriminate in favor of in-state business, despite requiring that price competition be no more vigorous than what could be sustained by a representative firm of only average efficiency *already doing business in Pennsylvania*. The state court reached this conclusion by: (a) ignoring the fact that the statute is by its terms facially discriminatory and, therefore, is virtually *per se* unconstitutional, (b) holding that a law does not discriminate against out-of-state commerce when some *in*-state companies are *also* penalized, and (c) relying on "local benefits" which this Court has found to be illegitimate. In all these ways, the court below stands in

conflict with the jurisprudence of this Court and other federal courts.

A. The State Court Improperly Classified The Facial Discrimination Explicit In The Statute As An "Indirect Burden" On Interstate Commerce, In Clear Contravention Of This Court's Jurisprudence.

The first step in any commerce clause analysis of a state statute alleged to burden interstate commerce is to determine whether it "regulates evenhandedly with only 'incidental' effects on interstate commerce, or discriminates against interstate commerce." *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979); see also *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). "A finding that state legislation constitutes 'economic protectionism' may be made on the basis of either discriminatory purpose, see *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 352-53 (1977), or discriminatory effect, see *Philadelphia v. New Jersey*, [437 U.S. 617 (1978)]." *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 270 (1984).

One need look no further than the Pennsylvania milk pricing law's statement of purpose for a clear declaration of such protectionist intent: "The board . . . shall . . . maintain such prices . . . as . . . will best protect the milk industry of the Commonwealth." 31 P.S. § 700j-801. Thus, in contrast to the state court's refusal even to address this argument, a federal three-judge court has already found that the purpose of the milk marketing law is, *inter alia*, to authorize the PMMB "to protect Pennsylvania processors from . . . out-of-state businesses." *Sylvan Seal Milk, Inc. v.*

Milk Control Commission of Pennsylvania, 270 F. Supp. 117, 121 (E.D. Pa. 1967). The law challenged here, then, is that most extreme of commerce clause violations, the "rare instance where a state artlessly discloses an avowed purpose to discriminate against interstate goods." *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354 (1951). On that basis alone the judgment below conflicts with this Court's commerce clause jurisprudence. See *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 522 (1935) ("Nice distinctions . . . between direct and indirect burdens . . . are irrelevant when the avowed purpose of the obstruction . . . is to suppress or mitigate the consequences of competition between the states."), for where a state law is "motivated by an intent to confer a benefit upon local industry not granted to out-of-state industry," it is "invalid." *Amerada Hess Corp. v. New Jersey Taxation Division*, 490 U.S. 66, 76 (1989).

To be invalid under the "negative" or "dormant" commerce clause, however, the state regulation need not so openly declare its hostility to interstate traffic or its preference for domestic firms. "As we use the term here," this Court has noted, " 'discrimination' simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter. If a restriction on commerce is discriminatory, it is virtually *per se* invalid." *Oregon Waste Systems v. Department of Environment*, 511 U.S. 93, 99 (1994). The touchstone of this Court's inquiry into such "discriminatory" effect is very simple: whether the regulation "violates the principle of the unitary national market by handicapping out-of-state competitors, thus artificially encouraging in-state production even when the same goods could be

produced at lower cost in other States." *West Lynn Creamery v. Healy*, 512 U.S. 186, 193 (1994).

The leading case on the subject is *Baldwin, supra*, in which "the State of New York attempted to protect its dairy farmers from the adverse effects of Vermont competition by establishing a single minimum price for all milk, whether produced in New York or elsewhere." *West Lynn Creamery*, 512 U.S. at 193. That law, however, similar to the scheme at issue here, was declared unconstitutional "because the minimum price regulation had the same effect as a tariff or customs duty – *neutralizing the advantage possessed by lower cost out-of-state producers.*" *Id.* at 194 (emphasis added). Similarly, in *West Lynn Creamery*, this Court struck down a state milk pricing order as "clearly unconstitutional" because "the pricing order . . . allow[ed] Massachusetts dairy farmers who produce at higher cost to sell at or below the price charged by lower cost out-of-state producers." *Id.* at 194-95. And, in the *Hunt* case, *supra*, this Court found a statute invalid because it "ha[d] the effect of stripping away from the [out-of-state] industry the competitive economic advantages it has earned." 432 U.S. at 351. Very simply, a state "may not insist that producers . . . in other States surrender whatever competitive advantages they may possess." *Brown-Forman Distillers v. New York State*, 476 U.S. 573, 580 (1986).

But that is precisely what the Pennsylvania milk pricing law demands of out-of-state producers. The minimum price below which no-one may sell milk in Pennsylvania is derived by reference to *only* milk distributors *already doing business* in the particular "milk marketing area" in

question *in Pennsylvania*. See 31 P.S. § 700j-801 ("producers, dealers and stores *in the area*) (emphasis added). The logical and necessary effect of this requirement is to prohibit firms doing business *outside of Pennsylvania* with greater efficiency and at lower cost from using that competitive advantage if they try to enter the Pennsylvania market: No below-average-cost firm can come in from outside the state and attempt to out-compete on price the average-cost firm already selling milk in Pennsylvania.

The state court's failure to find this requirement unconstitutional conflicts with the rulings of this Court and several lower federal courts in two ways:

First, in *effect* the law takes away the ability of any lower-cost out-of-state producer to come into Pennsylvania and use its cost advantage to out-compete in-state firms, as required by *Baldwin, West Lynn Creamery*, and *Brown-Forman, supra. Cf. Dairymen, Inc. v. Alabama Dairy Comm'n*, 584 F.2d 707, 713 (5th Cir. 1978) ("When it orders that all raw milk for Class I sales within [a state] be purchased inside the state at a fixed price, the [state] is indirectly regulating the price to be paid to the out-of-state producers. The obstruction to commerce between the states is as clear in this case as it was in the New York system struck down in *Baldwin*.").

Second, the statute *facially* and *explicitly* requires that prices be set by reference *only* to the cost-structures of firms *currently in the local market*. As this Court made clear in its most recent dormant commerce clause ruling, the singling out in a statute of firms on explicit in-state versus out-of-state criteria raises serious constitutional

problems. *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Maine*, 65 U.S.L.W. 4337, 4340 (May 19, 1997) ("It is not necessary to look beyond the text of this statute to determine that it discriminates against interstate commerce. The Maine law expressly distinguishes between entities that serve a principally interstate clientele and those that primarily serve an intrastate market . . . ."). Where a state law, "on its face, is designed to have discriminatory economic effects," it is invalid under the Commerce Clause. *Westinghouse Electric Corp. v. Tully*, 466 U.S. 388, 406-07 (1984).

In sum, the state court's failure to find unconstitutional a statute which, by its terms, prohibits out-of-state firms from reaping their natural competitive price advantage by fixing prices by reference to the cost-structure of only those firms currently doing business in-state, stands in direct conflict with this Court's commerce clause jurisprudence and the rulings of several lower federal courts. It should be reviewed and corrected by this Court.

B. The State Court's Position That The Statute Is Non-Discriminatory Because It *Also* Stifles The Competitiveness Of Efficient *In*-State Firms Has Been Rejected by This Court, But Has Been Adopted By Several Other Lower Courts And Should Thus Be Corrected by This Court

The state court held that this statute does not violate the commerce clause because "[w]hatever advantage or burden the Law provides to an efficient dealer, those effects accrue equally to an efficient in-state and an efficient out-of-state dealer," and "[s]ince any 'protectionism' in the Law aids (or burdens) similarly inefficient dealers

from any state, the Law is geography-neutral." *School District of Philadelphia v. PMMB*, 683 A.2d 972, 977 (Pa. Cmwlth. 1996), *app. denied*, 694 A.2d 625 (Pa. 1997). For this proposition, the state court cited *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 126 (1978), and *Norfolk Southern Corp. v. Oberly*, 822 F.2d 388, 406 (3d Cir. 1987). This is a misreading of this Court's decision in *Exxon*, exacerbating the similar misreading of that decision by the Third Circuit in *Norfolk Southern* – a conflict in commerce clause jurisprudence that only this Court can correct.

This Court has in fact explicitly rejected the position taken in this litigation by the Commonwealth of Pennsylvania and its courts. In *Exxon*, Maryland prohibited gas station ownership by refiners; it was contended that this discriminated against out-of-state commerce because there were no *in*-state refiners on whom this burden could fall. As this Court noted, however, because there were no in-state refiners to be benefitted by the law, and, in fact, all Maryland's gas came from out-of-state firms and would continue to, "such claims of disparate treatment between interstate and local commerce would be meritless." *Exxon*, 437 U.S. at 125. In fact, this Court noted, while certain *types* of interstate firms would be burdened in relation to *other types* of *interstate* firms, this burden "on some interstate companies," *id.* at 126, did not constitute a discriminatory burden on interstate *commerce*. *Id.* at 127-28. As the Court has subsequently explained, this is because such unconstitutionality requires direct in-state and out-of-state competitors. See, *e.g.*, *General Motors Corp. v. Tracy*, 117 S.Ct. 811, 824-25

(1997). For that reason, the *Exxon* decision is an "anomalous exception" to overall commerce clause jurisprudence. Smith, *State Discriminations Against Interstate Commerce*, 74 CALIF. L. REV. 1203, 1218 (1986).

The state court nevertheless interpreted *Exxon* to mean that regulations burdening in-state firms *as well as* out-of-state firms do not burden *interstate commerce*. But that is not the proposition for which *Exxon* – a rare case in which there were *no relevant in-state firms* – stands. In fact, as the *Exxon* Court itself stated,

> If the effect of a state regulation is to cause local goods to constitute a larger share, and goods with an out-of-state source to constitute a smaller share, of the total sales in the market . . . the regulation may have a discriminatory effect on interstate commerce. But the Maryland statute has no impact on the relative proportions of local and out-of-state goods sold in Maryland and, indeed, no demonstrable effect whatsoever on the interstate flow of goods.

Id., 437 U.S. at 126 n.16. That fact pattern is clearly not the case here.

Thus, this Court's recent decision in *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994), explicitly rejected the state court's approach. In *Carbone*, an ordinance required use of a particular waste processing facility by *all* recyclers – whether in- or out-of-state. Although there was no facial discrimination between in-state and out-of-state handlers, and the restriction affected in-state and out-of-state businesses *equally*, this Court struck down the ordinance as unconstitutional on the ground

that if an ordinance merely affects interstate commerce negatively, then regardless of its effect on *in*-state commerce, that burden is "discriminatory" against interstate commerce. *Id.* at 389 ("It is well-settled that actions are within the domain of the Commerce Clause if they burden interstate commerce or impede its flow.") This is true even though "the ordinance erects no barrier to the import or export" of any article. *Id.* at 390. This Court then declared, as if in direct rebuttal to the holding of the state court here, that it "is no less discriminatory because in-state or in-town processors are also covered by the prohibition." *Id.* at 391. "Indeed, we have long recognized that 'a burden imposed by a State upon interstate commerce is not to be sustained simply because the statute imposing it applies alike to . . . the people of the State enacting such statute.' " *Id.*, at 405 (O'Connor, J., concurring) (quoting *Brimmer v. Rebman*, 138 U.S. 78, 83 (1891)).

The opinion of the state court thus stands in clear conflict with the jurisprudence of this Court. Moreover, it exacerbates a misunderstanding of *Exxon* propagated by the Third Circuit, see *Norfolk Southern Corp. v. Oberly*, 822 F.2d 388, 406 (3d Cir. 1987); *Old Bridge Chemicals v. New Jersey Dept. of Envir. Protection*, 965 F.2d 1287 (3d Cir. 1992); *Ford Motor Co. v. Insurance Comm'r, Cmwlth. of Penna.*, 874 F.2d 926 (3d Cir. 1989), and relied upon by the state court here. In fact, there are several other errant cases in other jurisdictions which erroneously "suggest[ ] that a disproportionate burden on interstate commerce is insufficient to establish a 'discriminatory effect' for the purposes of triggering strict scrutiny." Comment, *Environmental Provincialism, The Commerce Clause, and Hazardous Waste: The High Court Hazards a Guess*, 27 WAKE FOREST

L. REV. 949, 969 (1992). The Comment cites as an example *Archer Daniels Midland Co. v. State*, 690 P.2d 177 (Colo. 1984), which "refused to apply strict scrutiny to a facially neutral statute despite a showing that it disproportionately benefitted intrastate commerce" and cited *Exxon* "[a]s authority for its conclusion that the disproportionate impact [upon out-of-state commerce] evidenced only an 'incidental burden.' " Comment, 27 WAKE FOREST L. REV. at 970. The position adopted in these cases is in fact an explicit and decisively-rejected *alternative* to this Court's existing jurisprudence. See *CTS Corp. v. Dynamics Corp. Of America*, 481 U.S. 69, 96 (1987) (Scalia, J., concurring in the judgment).

This Court should therefore overturn the decision of the court below, which clearly conflicts with this Court's jurisprudence, and correct the misapplication of *Exxon* in various decisions in state and federal courts which have erroneously ruled that burdening interstate commerce is constitutionally acceptable if *some in*-state firms are *also* burdened.

C. The State Court Improperly Ruled That The Statute Is Not Unconstitutional Because The Burden On Interstate Commerce Is Outweighed By Local Interests Which This Court Has Classified As Illegitimate, Or To Which There Are, Under This Court's Jurisprudence, Alternatives That Do *Not* Burden Interstate Commerce.

After erroneously asserting that the statute at issue imposes only an "indirect" and non-discriminatory burden on interstate commerce, the state court then concluded that this burden is "outweighed by important

local benefits, [and thus] the Law does not violate the Commerce Clause of the United States Constitution." *School District of Philadelphia v. PMMB*, 683 A.2d at 978. The Pennsylvania law on its face, and the state court's opinion itself, offer only a limited number of justifications for the statute's operation: to protect the domestic industry, to prevent fraud, to "insure a sufficient quantity of pure and wholesome milk," and to protect the public health and welfare. See *id.*, and 31 P.S. §§ 700j-101 & 700j-801. None of these rationale prove availing in this context, as all have been rejected under this Court's prior rulings.

Needless to say, a desire to protect Pennsylvania milk distributors, or any other segment of the Pennsylvania milk industry, is not a valid justification for the discriminatory effect of the pricing structure. See, *e.g.*, *New Energy Co. v. Limbach*, 486 U.S. 269, 273-74 (1988) ("valid factor" must be "unrelated to economic protectionism").

As for protection of the public health, using that excuse for economic protectionism in the milk context was long ago dismissed by the this Court for what it is. As Justice Cardozo wrote in *Baldwin*:

> The argument is pressed upon us, however, that the end to be served by the Milk Control Act is something more than the economic welfare of the farmers or of any other class or classes. The end to be served is the maintenance of a regular and adequate supply of pure and wholesome milk; the supply being put in jeopardy when the farmers of the state are unable to earn a living income. . . . Price security, we are told, is only a special form of sanitary security;

> the economic motive is secondary and subordinate; the state intervenes to make its inhabitants healthy, and not to make them rich. On that assumption we are asked to say that intervention will be upheld as a valid exercise by the state of its internal police power, though there is an incidental obstruction to commerce between one state and another. This would be to eat up the rule under the guise of an exception. Economic welfare is always related to health, for there can be no health if men are starving. Let such an exception be admitted, and all that a state will have to do in times of stress and strain is to say that its farmers and merchants and workmen must be protected against competition from without, lest they go upon the poor relief lists or perish altogether. To give entrance to that excuse would be to invite a speedy end of our national solidarity.

294 U.S. at 522-23.

Moreover, whatever value the health rationale might have had when milk marketing statutes were first enacted in the early part of this century, they no longer carry any weight thanks to technological advance. Milk transported over long distances for several days might have posed a severe sanitary risk in the 1920's. It simply doesn't today. It is time for Pennsylvania's milk price regulations to move into the twentieth century, as well.

In any event, even were measures needed to protect Pennsylvania consumers against unwholesome milk, the obligation upon the State would be to show that there are no adequate non-discriminatory means for doing so. This is a showing that the State clearly could not make: Sanitary milk standards are better – and constitutionally –

maintained through equitably applied milk sanitation regulations than through a discriminatory pricing mechanism. See, *e.g.*, *Schwegmann Bros. Giant Super Mkts. v. Edwards*, 323 So.2d 810, 815 (La. App. 1975).

The only ostensible rationale for such a system is the potential evil of such competitive "frauds" as predatory price-cutting and consumer price-gouging. Guarding *against* price-gouging is obviously not the purpose here: At prices 40% above those in surrounding states, it is clear that the Pennsylvania law's effect, if not indeed its intent, is to *mandate* price-gouging.

And as for predatory pricing, other means now exist for guarding against this evil – and are zealously pursued by the state and federal governments, as they should be. In any event, if predatory pricing were the target of a milk pricing statute, it would be structured as was New Jersey's, which required dealers to sell at prices reflective of *their own* actual costs rather than a New Jersey-based minimum, and was thus constitutional, *State of New York v. Brown*, 721 F. 629, 640-41 (D.N.J. 1989) – in contrast to *Pennsylvania*'s milk pricing scheme, which is subject to attack for requiring precisely the opposite.

Thus, as the State's own witness recognized, minimum price maintenance is absolutely unnecessary for firms in the milk business to earn a profit: As in any other business in any other state in America, "[d]ealers may, if the price is too low and below dealer's cost they may, through self help, raise that price up." R. 554a.

The state court's ruling thus conflicts with this Court's jurisprudence establishing that *none* of the asserted purposes for imposing this minimum consumer

price for milk are legitimate. It thus merits review and reversal.

II. THE QUESTION PRESENTED IS IMPORTANT

Any question of attempted state protectionism is inherently important. As this Court has itself declared, "every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders." *H.P. Hood & Sons v. Du Mond*, 336 U.S. at 539.

This is because "[t]here is no doubt that free flow of interstate commerce is important to the economic health of the United States. Two conservative economists have even gone so far as to write, '[T]he rise of the United States to dominate the world economy in the 20th Century is directly related to the creation of the vast U.S. free trade zone.' " Note, *Massachusetts Tax and Subsidy Scheme Violates Commerce Clause:* West Lynn Creamery, Inc. v. Healy, 48 TAX LWYR. 641, 645 (1995) (footnote omitted). This merely echoes the words of Justice Felix Frankfurter, when he said, "Indeed, there are those who find the genius of American industry not in Big Technology (or some special capacity of our businessmen) but in the incentive of a Big Open Market." F. Frankfurter, THE COMMERCE CLAUSE 119.

Thus, Justice Holmes famously concluded:

> I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several States. For one in

> my place sees how often a local policy prevails with those who are not trained to national views and how often action is taken that embodies what the Commerce Clause was meant to end.

O.W. Holmes, *Law and the Court*, in COLLECTED LEGAL PAPERS 391, 295-96 (1920), *quoted in* Brown, *The Open Economy: Justice Frankfurter and the Position of the Judiciary*, 67 YALE L.J. 219, 219 (1957).

But this is not just *any* case of protectionism – it is at once both particularly extreme, and particularly subtle. The milk industry has generated more commerce clause litigation than probably any other field of economic endeavor, at least in this Court. The dairy industry appears particularly intent upon, and adept at, introducing new protectionist legislation to attempt to evade whatever this Court's most recent rulings attempt to eliminate. The Pennsylvania law is, even in this context, extreme in that, while, at the time of the Great Depression, the vast majority of states had minimum price maintenance systems for milk, almost all have been either declared unconstitutional or abandoned. Only three states still maintain such crude attempts at protectionism, generally focusing on more sophisticated means to protect their domestic dairy industries against the rigors of competition. The fact that Pennsylvania's law stands as almost-uniquely out-dated and extreme in its anti-competitiveness is a fact of some importance weighing in favor of a grant of *certiorari*. *Cf. Santosky v. Kramer*, 455 U.S. 745, 749-51 (1982) (certiorari warranted where New York permanent neglect statute permitted lesser standard of proof than that specified in statutes of 35 other states, District of Columbia and Virgin Islands).

At the same time, the Pennsylvania law poses a great potential threat to a national open market, whether in milk or other articles of commerce, in that its protectionism, while "facial," is subtly "masked." If allowed to stand, such an approach could easily "invite a multiplication of preferential trade areas destructive of the very purposes of the Commerce Clause." *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 356 (1951). Instead of imposing a distinct fee explicitly on out-of-staters, *cf., e.g., Chemical Waste Management, Inc. v. Hunt*, 504 U.S. 334 (1992), the Pennsylvania law more subtly sets up a price calculation based entirely upon the supposed (and arguably inflated) cost structures of only those firms already doing business *in*-state – and, at that, not even the most *efficient* in-state producers, who would set the standard in a free market, but an "average" that *must* include high-cost producers. R. 489a (PMMB staff expert testifies that "we strenuously resist any deletion of high cost dealers").

The result is that any out-of-state firm wishing to enter the Pennsylvania market and out-compete firms already there by offering a lower price cannot do so; instead, to its price is added a state-mandated mark-up to bring its selling price up to at least that at which domestic firms of only moderate (*i.e.*, uncompetitive) efficiency can sell. Unlike an import duty, the out-of-state firm gets to pocket that mark-up itself, rather than having it go to the state's coffers, but otherwise the effect is the same as such a duty – driving up the cost to consumers of the out-of-state good to a level at which otherwise-uncompetitive in-staters can compete, and thereby, presumably, reducing the out-of-state seller's market share. This is precisely what this Court has said states may not do. *Baldwin*, 294

U.S. at 527; *West Lynn Creamery*, 512 U.S. at 194-95; *Brown-Forman*, 476 U.S. at 580. Pennsylvania simply does the forbidden more subtly, imposing a *de facto* import duty through a price mark-up instead of an explicit duty, calculated through an obscure formula instead of a clear add-on, and without reference to out-of-staters.

Pennsylvania's Milk Marketing Law thus flies in the face of the dual purpose of the dormant commerce clause, to "require[ ] that buyers and sellers be free to make their own business decisions, not [only] that they deal fairly with outsiders." D. Currie, THE CONSTITUTION IN THE SUPREME COURT: THE SECOND CENTURY, 1888-1986 (1990), at 584. At a time when the American vision of free markets and free trade is triumphing across the globe, the Pennsylvania law is strangely out of step. It should be relegated to the history books.

CONCLUSION

For the foregoing reasons, Petitioners respectfully pray that this Court issue a writ of certiorari to the Commonwealth Court of Pennsylvania, to review the judgment below.

Respectfully submitted,

ERIC B. SCHNURER
Counsel of Record

APPENDIX

APPENDIX A

IN THE COMMONWEALTH COURT
OF PENNSYLVANIA

THE SCHOOL DISTRICT OF PHILADELPHIA and CONSUMERS EDUCATION AND PROTECTIVE ASSOCIATION and LANCE HAVER, on behalf of himself and all others similarly situated,	:	NO. 2716 C.D. 1995 ARGUED: JUNE 12, 1996
Petitioners	:	
v.	:	
PENNSYLVANIA MILK MARKETING BOARD,	:	
Respondent	:	

BEFORE: HONORABLE JAMES GARDNER COLINS, President Judge
HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE DORIS A. SMITH, Judge
HONORABLE DAN PELLEGRINI, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Judge
HONORABLE JIM FLAHERTY, Judge
HONORABLE BONNIE BRIGANE LEADBETTER, Judge

OPINION BY JUDGE LEADBETTER

FILED: October 18, 1996

This is a petition for review of Official General Order No. A-890 issued by the Pennsylvania Milk Marketing

Board, pursuant to Pennsylvania's Milk Marketing Law. The order fixed minimum wholesale prices for milk in Milk Market Area 1 including the prices charged to schools.[1] Petitioners, the School District of Philadelphia, Consumers Education and Protective Association, and Lance Haver[2] ask this Court to declare the Milk Marketing Law unconstitutional, to vacate the subject official general order, and to direct the Board to permit minimum wholesale prices for school milk to be fixed by market forces. We affirm the order of the Board.

In Pennsylvania, the sale of milk is regulated and controlled by the Milk Marketing Law ("the Law"), Act of April 28, 1937, P.L. 417, *as amended*, 31 P.S. §§ 700j-101 to 700j-1302. The Law is implemented by the Milk Marketing Board (the Board), an independent administrative agency. 31 P.S. § 700j-201. Section 802 of the Law directs the Board to fix by official order the minimum prices for the wholesale and retail sale of milk. 31 P.S. § 700j-802.

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[1] Milk Marketing Area 1 is all municipalities, cities, boroughs and townships located within the counties of Bucks, Chester, Delaware, Montgomery and Philadelphia.

[2] The case caption suggests that Mr. Haver is the nominal plaintiff in a class action suit. However, a review of the docket in this action reveals that there have been no motions filed or other actions taken to make this a class action. Moreover, Mr. Haver has set forth no basis upon which a class action could be authorized for or would apply to a proceeding before the Milk Marketing Board. See generally: *Property Owners, Residents, and/or Taxpayers of Pleasant Valley School District v. Pleasant Valley School District*, 515 A.2d 85, 87 n.3 (Pa. Cmwlth. 1986) (administrative code does not make provision for maintenance of a class action).

Section 801 of the Law requires the Board to base minimum prices "upon all conditions affecting the milk industry in each milk marketing area, including the amount necessary to yield a reasonable return . . . on aggregate milk sales by milk dealers or handlers and stores selling milk." 31 P.S. § 700j-801. In ascertaining such returns, the Board considers the costs incurred by a cross-section of dealers representative of dealers in the area. *Id.* Milk dealers are allowed a rate of return of two and one-half (2 1/2%) percent to three and one-half (3 1/2%) percent "based on net sales of price-controlled products determined in accordance with generally accepted accounting principles." *Id.*

In December 1994, Lehigh Valley Dairies, Inc., applied to the Board for a price hearing to revise Official General Order A-863 (OGO A-863) and establish new minimum prices for the purchase and sale of milk in Area 1. The Board granted Lehigh's application and the hearing was held over several days in June of 1995.[3] The Board heard testimony from a representative of Lehigh, representatives of the School District of Philadelphia, and the Board's staff.

During the hearing, Area 1 was characterized as a competitive market in which milk dealers from both Pennsylvania and New Jersey compete. In recognition of the New Jersey influence, a nearby New Jersey milk

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[3] In support of its application, Lehigh had asserted that OGO A-863 was based on cost information for calendar year 1989, that processing costs had risen substantially in the interim, and that orders for all other milk marketing areas had been revised at least once since OGO A-863 went into effect.

dealer was included in the dealer cross-section considered. The School District of Philadelphia provided evidence that it purchases milk from a dealer who does business in both states and that dealer sells half-pints of milk to the similar urban schools in New Jersey for approximately four cents less than the school district is required to pay in Philadelphia. The School District also presented evidence that the price of milk charged to general consumers is higher in Pennsylvania than in neighboring states.

After the hearing, submission of briefs and a pre-order conference open to all interested parties, the Board issued Official General Order A-890 (OGO A-890) fixing minimum prices in Area 1, effective October 1, 1995. The order reduced half-pint prices for milk sold to schools by approximately one and one-third (1 1/3) cents.[4] The School District had sought a reduction of approximately five (5) cents.

Petitioners make the general complaint that OGO A-890 interferes with market forces and thus denies them the opportunity to purchase milk in Pennsylvania at a competitive price. They contend that enforcement of the Milk Marketing Law causes the School District of Philadelphia to spend an additional one million ($1,000,000.00)

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[4] Before the effective date of OGO A-890, Lehigh applied to the Board for a revision of the Area 1 order. On October 20, 1995, the Board issued OGO A-890 Amended, which became effective on December 1, 1995. The amended order provided for a recalculation of the price of milk for all container sizes by allowing an increase for small containers, but exempted from its scope half-pints sold to schools and spread the lost revenue over the other container sizes.

dollars per year to purchase the milk it serves to students. The specific legal issues raised in this appeal are: (1) whether the enforcement of the Milk Marketing Law, particularly [31 P.S.] § 700j-801, violates the Commerce Clause of the United States Constitution;[5] (2) whether the procedures followed by the Board in adopting OGO A-890 violated petitioners' right to due process of law; and (3) whether the Board erred in its evaluation of evidence presented at the hearing.

Petitioners first contend that Section 700j-801 of the Law, which provides for the establishment of minimum prices, violates the Commerce Clause of the United States Constitution. A lawfully enacted statute carries a presumption of constitutionality. *In Re Petition To Increase Millage Limit*, 646 A.2d 61, 63 (Pa. Cmwlth. 1994). "Legislation will not be invalidated unless it clearly, palpably, and plainly violates the Constitution, and any doubts are to be resolved in favor of a finding of constitutionality." *Pennsylvania Liquor Control Board v. Spa Athletic Club*, 506 Pa. 364, 370, 485 A.2d 732, 735 (1984). After careful review

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[5] The Attorney General of Pennsylvania, who has intervened in this matter, asserts that the School District lacks the capacity to make this challenge on the ground that a school district has no rights under the federal constitution which it may assert in opposition to the will of the Commonwealth, its creator. *Penn-Delco School District v. Schukraft*, 506 A.2d 956 (Pa. Cmwlth. 1986) *appeal denied* 514 Pa. 644, 523 A.2d 1133 (1987); *School District of Philadelphia v. Pennsylvania Milk Marketing Board*, 877 F. Supp. 245 (E.D. Pa. 1995); *Northwestern School District of Pittenger*, 397 F. Supp. 975 (W.D. Pa. 1975). While we agree that this is an accurate statement of the law, the remaining petitioners may raise the challenge, and have done so. Thus the School District's ability to assert this issue is of no consequence.

of case law interpreting the Commerce Clause, we conclude that petitioners have failed to sustain the heavy burden of establishing unconstitutionality. *See In Re Petition To Recall Reese*, 542 Pa. 114, 119, 665 A.2d 1162, 1164 (1995).

The Commerce Clause gives Congress the power to regulate commerce among the several states and with foreign nations. United States Constitution, Art. I, § 8, cl. 3. This affirmative grant of power to Congress "has long been recognized as a self-executing limitation on the power of the States to enact laws imposing substantial burdens on such commerce." *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82, 87, 104 S.Ct. 2237, 2240, 81 L. Ed. 2d 71, 76 (1984). Thus, the Commerce Clause has long been understood to prohibit the states from discriminating against or imposing an unjustifiable burden upon the interstate flow of articles of commerce. *Oregon Waste Systems, Inc. v. Department of Environmental Quality of the State of Oregon*, 511 U.S. 93, ___, 114 S.Ct. 1345, 1349, 128 L. Ed. 2d 13, 20 (1994).

In determining whether a legislative enactment violates the Commerce Clause, a distinction must be made "between state statutes that burden interstate transactions only incidentally, and those that affirmatively discriminate against such transactions." *Maine v. Taylor*, 477 U.S. 131, 138, 106 S.Ct. 2440, 2447, 91 L. Ed. 2d 110, 120 (1986). When a state statute directly favors in-state economic interests over out-of-state interests, it is discriminatory and the United States Supreme Court has generally struck it down. *Brown-Forman Distillers Corp v. New York State Liquor Authority*, 476 U.S. 573, 579, 106 S.Ct. 2080, 2084, 90 L. Ed. 2d 552, 559 (1986). In other

words, "where simple economic protectionism is effected by state legislation, a virtually per se rule of invalidity has been erected." *Philadelphia v. New Jersey*, 437 U.S. 617, 624, 98 S.Ct. 2531, 2535, 57 L. Ed. 2d 475, 481 (1978). "Moreover, finding that state legislation constitutes 'economic protectionism' may be made on the basis of either discriminatory purpose . . . or discriminatory effect." *Bacchus Imports v. Dias*, 468 U.S. 263, 270, 104 S.Ct. 3049, 3054, 82 L. Ed. 2d 200, 206 (1984) (citations omitted).

On the other hand, it has been recognized "that incidental burdens on interstate commerce may be unavoidable when a State legislates to safeguard the health and safety of its people." *Philadelphia v. New Jersey*, 437 U.S. at 623-24, 98 S.Ct. at 2535, 57 L. Ed. 2d at 481, and that "[e]very state police statute necessarily will affect interstate commerce in some degree, but such a statute does not run counter to the grant of Congressional power merely because it incidentally or indirectly involves or burdens interstate commerce." *Milk Control Board v. Eisenberg Farm Products*, 306 U.S. 346, 351, 59 S.Ct. 528, 530, 83 L. Ed. 752, 756 (1939). Thus, it has long been held that "[w]here the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S.Ct. 844, 847, 25 L. Ed. 2d 174, 178 (1970). As the Supreme Court noted:

> The crucial inquiry, therefore, must be directed to determining whether [the statute] is basically a protectionist measure, or whether it can fairly be viewed as a law directed to legitimate local

> concerns, with effects upon interstate commerce that are only incidental.

Philadelphia v. New Jersey, 437 U.S. at 624, 98 S.Ct. at 2536, 57 L. Ed. at 482.

Petitioners claim that the price fixing provision of the Milk Marketing Law is protectionist because the Law precludes more efficient out-of-state milk dealers from selling milk in Pennsylvania at prices less than those charged by less efficient Pennsylvania milk dealers, thereby precluding out-of-state dealers from taking advantage of their natural competitive edge. Such a minimum pricing scheme, petitioners argue, amounts to economic protectionism of Pennsylvania's milk industry. This argument is meritless. Whatever advantage or burden the Law provides to an efficient dealer, those effects accrue equally to an efficient in-state and an efficient out-of-state dealer. Unquestionably, a wide range of efficiencies among dealers exists both in and out of state. However, "[t]he fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce." *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 126, 98 S.Ct. 2207, 2214, 57 L. Ed. 2d 91, 100 (1978).

Petitioners attempt to support their case by claiming that Pennsylvania's higher prices resulting from application of the Law demonstrate the inefficiency of Pennsylvania's dealers. This argument is devoid of logical or evidentiary support. Since any "protectionism" in the Law aids (or burdens) similarly inefficient dealers from any state, the Law is geography-neutral. As noted by the United States Court of Appeals for the Third Circuit:

> Where the "burden" on out-of-state interests is no different from that placed on competing in-state interests, however, it is a burden on *commerce* rather than a burden on *interstate* commerce.

Norfolk Southern Corp. v. Oberly, 822 F.2d 388, 406 (3d Cir. 1987).

Petitioners' reliance upon *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 114 S.Ct. 2205, 129 L. Ed. 2d 157 (1994) is misplaced. In *West Lynn Creamery*, the United States Supreme Court struck down a federal milk pricing order[6] which imposed an assessment on milk sold by dealers to Massachusetts retailers. While the assessment itself was even handed, the entire assessment was *distributed* to Massachusetts dairy farmers. Because the order's avowed purpose and its undisputed effect were to subsidize *only* Massachusetts dairy farmers in order to allow them to compete with lower cost dairy farmers in other states, the Court held that the assessment represented the hallmark of economic protectionism prohibited by the Commerce Clause. *Id.* at ___, 114 S.Ct. at 2212, 2217, 129 L. Ed. 2d at 167-68, 174.

Conversely, as the United States District Court for the Middle District of Pennsylvania stated regarding Pennsylvania's Law, "[a]t most, the price controls do not burden but have only an incidental effect on interstate commerce which would not prevent Pennsylvania from

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[6] The Agricultural Adjustment Act, 7 U.S.C. § 601, *et seq.* authorizes the Secretary of Agriculture to regulate the minimum prices paid to producers of raw milk by issuing marketing orders for particular geographic areas.

pursuing its legitimate goals." *United Dairy Farmers Cooperative Ass'n v. Milk Control Commission*, 335 F. Supp. 1008, 1014 (M.D. Pa. 1971), *aff'd*, 404 U.S. 930, 92 S.Ct. 280, 30 L. Ed. 2d 244 (1971).

Having determined that Pennsylvania's statutory scheme places only an incidental burden on interstate commerce, we must next evaluate the local interests which the Law is designed to foster. We need not engage in extended discussion of this point, however, because the statutory purposes are clearly set out and have recently been reviewed by this Court.

Pennsylvania's Milk Marketing Law gives the Board authority to establish milk prices "as will be most beneficial to the public interest, best protect the milk industry of the Commonwealth and insure a sufficient quantity of pure and wholesome milk to inhabitants of the Commonwealth, having special regard to the health and welfare of children residing therein." 31 P.S. § 700j-801. The purpose of the Law "is to regulate the sale of milk and milk products so as to ensure that an adequate supply of milk exists and to establish a uniform economic condition for suppliers of milk." *Township of Muhlenberg v. Clover Farms Dairy Co.*, 665 A.2d 544, 548 (Pa. Cmwlth. 1995), *appeal denied*, ___ Pa. ___, 678 A.2d 367 (1996). In upholding the legitimacy of that purpose, this Court has declared:

> The General Assembly, in providing for retail minimum price controls to provide stability in the retail milk market, believed a stable supply of milk is ensured when the retailer is assured an adequate return on the sale because the milk industry relies on retailers to distribute their product to the consumers. Since milk

> remains a vital commodity in Pennsylvania and the General Assembly finds that an adequate supply at a stable price is required for the benefit of the citizens, retail minimum price controls are a rational means to be employed by the General Assembly to achieve that objective.

Finucane v. Pennsylvania Milk Marketing Board, 582 A.2d 1152, 1156 (Pa. Cmwlth. 1990). Because the Milk Marketing Law places only an incidental burden on interstate commerce, which burden is outweighed by important local benefits, the Law does not violate the Commerce Clause of the United States Constitution.

Petitioners next allege that they were denied due process of law during the proceedings associated with the issuance of OGO A-890. Petitioners claim that the Board favors the interests of milk dealers and, thus, it failed to remain impartial during the proceedings and issued an order which deprived the consuming public of a just price for milk. In fact, petitioners assert the Board and its staff are in collusion with the milk industry which it regulates.

There is no question that due process is required in all hearings before administrative agencies of the Commonwealth. *Brookwood Farms v. Milk Marketing Board*, 304 A.2d 510, 514 (Pa. Cmwlth. 1973); *Sherman v. Kaiser*, 664 A.2d 221, 224 n.1 (Pa. Cmwlth. 1995). "Due process is a concept incapable of exact definition. Rather, it is a flexible notion which calls for such procedural safeguards as a particular situation demands to ensure fundamental fairness to a potentially aggrieved litigant." *Plowman v. Plowman*, 409 Pa. Superior Ct. 143, 151, 597 A.2d 701, 705 (1991). However, "a fair and impartial tribunal in the first

instance is a cornerstone of our notion of due process." *Lyness v. State Board of Medicine*, 529 Pa. 535, 547 n.12, 605 A.2d 1204, 1210 n.12 (1992).

The delicate balance which faces the Milk Marketing Board in fixing prices is to provide a fair return to producers and dealers, while maintaining a just consumers' price. *Colteryahn Sanitary Dairy v. Milk Control Commission*, 332 Pa. 15, 27, 1 A.2d 775, 781 (1938). The Board must give equal consideration to the interests of milk producers, milk dealers, and the consuming public when fixing the price of milk. *Pittsburgh v. Milk Marketing Board*, 275 A.2d 115, 119-20 (Pa. Cmwlth. 1971). Review of the record demonstrates that the Board fully complied with this charge and provided all interested parties with due process of law.

Carl Herbein, a certified public accountant retained by Lehigh to prepare an expert report on dealer costs, testified that he had not considered consumers' ability to pay when conducting his Area 1 cost study. The Board sustained an objection to follow-up questions on relevancy grounds. (R.117a-18a). Petitioners' assert this ruling demonstrates that the Board ignored its legal responsibility to milk consumers. Mr. Herbein was offered as an expert on dealer costs. His testimony pertained to processing and distribution costs incurred by Area 1 milk dealers. Consumers' ability to pay milk prices was entirely outside the scope of Mr. Herbein's direct testimony and, presumably, his expertise. While a factor to be considered by the Board, the law does not require milk dealers to establish consumers' ability to pay in making their case for the establishment of new minimum prices. 31 P.S. § 700j-801. There is nothing in the

record to suggest that the Board failed to weigh this factor, nor that any particular evidence would have been necessary or helpful to the Board's consideration of the issue. Neither Mr. Haver nor the consumer organization made any effort to present such evidence. Thus, petitioners' first argument is meritless.

Petitioners' second argument also arises from the cross-examination of Mr. Herbein. The Board requires all milk dealers to file annual financial statements, which were used by Mr. Herbein in preparation of his cost study. During cross-examination, counsel for Cumberland Farms Agency, one of several interested parties to the proceeding, asked Mr. Herbein to produce the financial statements that he had used. An objection was raised and it was argued that the document request was made purely for purposes of delaying the hearing. (R.136a-39a). Petitioners contend that the Board's decision to sustain the objection shows that dealer financial statements were impermissibly kept confidential and made available only to the dealers and the Board. No such inference can reasonably be drawn. The statute specifically provides that such statements must be made available to the general public upon request. 31 P.S. § 700j-308.1. Yet prior to the commencement of the hearing, neither Cumberland Farms nor petitioners[7] had made any request to the Board or the dealers for such statements. Instead, an untimely request was made during cross examination of an expert witness and was denied because it would have delayed

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[7] Indeed petitioners have never made a request for these documents, and do not here challenge the evidentiary ruling itself.

the hearing. Under such circumstances, there is no merit to petitioners' claim that the evidentiary ruling manifested bias on the part of the Board.

The remaining evidence of record to which petitioners point in support of their contention that the Board acted partially involves various actions taken by members of the Board's investigatory staff. The Board maintains an Enforcement and Accounting Division to enforce compliance with Milk Marketing laws and regulations and to gather and interpret financial and accounting information used by the Board in hearings. *The Pennsylvania Manual,* Vol. 112, p. 4-116 (1995). In a price-fixing hearing, the development and presentation of evidence is performed by members of the investigative staff. The Board itself hears the evidence presented and decides the case. Such dual roles are not at all uncommon in administrative agencies, and due process concerns are implicated only where an impermissible appearance of bias "arises from an *actual* environment of commingled functions." *Stone & Edwards Ins. Agency v. Department of Ins.*, 538 Pa. 276, 282, 648 A.2d 304, 307 (1994). There is no evidence here that the Board commingled its adjudicatory and investigatory functions. None of the acts complained of involved any Board members, but were generally unremarkable trial preparation cooperation between representatives of the Board's investigatory staff and the representatives of the dealers. Pre-hearing agreements regarding evidence is neither novel nor sinister. Petitioners were also free to contact Board staff to discuss the evidence prior to the hearing, and their failure to do so does not make other parties' pre-trial cooperation

improper. Accordingly, we find no violation of petitioners' right to due process.

Finally, petitioners challenge two aspects of the Board's evaluation of evidence which they claim resulted in an unfairly high price. Specifically, petitioners claim that the Board's utilization of a sample cross-section which included high-cost, inefficient dealers runs contrary to a requirement that the Board utilize "a cross-section representative of the average of the *normally efficient* producers or dealers in the district." *Colteryahn Sanitary Dairy v. Milk Control Com.*, 332 Pa. at 27, 1 A.2d at 781. (Emphasis added). The Board argues that the *Colteryahn* standard is no longer viable and found that "[i]nclusion in the cross-section of both high-cost and low-cost dealers is appropriate." (Official General Order A-890, Sept. 22, 1995, Finding of Fact 5(e)).

In 1938, the average efficiency requirement was announced in *Colteryahn Sanitary Dairy*.[8] In 1941, the General Assembly codified the requirement by amending Section 801 to require the Board to ascertain a reasonable return to the milk dealers by utilizing, "a cross-section representative of the average or normally efficient . . . dealers or handlers in the area." 31 P.S. § 700j-801 (1941) (subsequently amended). However, Section 801

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[8] The *Colteryahn* case interpreted the original version of Section 801 which provided: "The [Board] shall base all prices upon all conditions affecting the milk industry in each milk marketing area, including the amount necessary to yield a reasonable return to the producer and to the milk dealer." 31 P.S. § 801 (1937) (subsequently amended).

was again amended and the "average or normally efficient" characterization of representiveness was deleted. In its present form, Section 801 requires that the Board "shall utilize . . . a cross-section representative of producers, dealers and stores in the area and shall consider unit costs of various types of products and of various sizes of containers." 31 P.S. § 700j-801. *Babac v. Pennsylvania Milk Marketing Board*, 618 A.2d 1050, 1052-53 (Pa. Cmwlth. 1992). Thus the Board did not err as a matter of law in the standard it utilized.[9]

Nor did it err when it found that the evidence presented satisfied this standard. In this case, the Board staff and the Area 1 milk dealers presented evidence showing the average costs of a cross-section of dealers in 1994 for various sizes of containers. The cross-section considered by the Board consisted of five dealers located within Area 1 and one dealer located in New Jersey who sells milk in Area 1. The evidence was that the six dealers comprising the cross-section were representative of dealers in the area based upon consideration of volume of sales in the area, the types of products and variety of container sizes sold, range of customers served, and the type and volume of deliveries made by the dealer. (R.447a-48a, 453a). After reviewing this evidence, the Board found the cross-section to be representative because: (1) the cross-section was geographically diverse; (2) the cross-section

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[9] The determination of the appropriate standard is a ruling of law over which we exercise plenary review; whether the evidence reflected a representative cross-section is a factual determination over which our review is limited to determining whether the finding is supported by substantial evidence.

accounted for 62.2% of the total sales of Class I milk in Area 1 during 1994; (3) the dealers in the cross-section sell milk in various container sizes that are representative of the containers sold by dealers in Area 1; and (4) the dealers in the cross-section sell to customer types representative of Area 1, namely supermarkets, convenience stores, "mom and pop" stores, schools and institutions. (Official General Order A-890, Sept. 22, 1995, Finding of Fact 5). Because there was substantial evidence supporting the Board's finding, we will not disturb it on appeal. *Babac*, 618 A.2d at 1051.

Petitioners next argue that their evidence showed that the cumulative effect of a number of inflation factors resulted in overstating the price of milk by nearly five (5) cents. The petitioners allege that the Board's reliance upon total costs, including fixed costs, inflated the cost figures, and suggest that a variable cost approach would have prevented distortion. Petitioners further assert that the cross-section data weighing method accepted by the Board distorts dealer costs and further inflates the price of milk by systematically and dramatically discounting the low cost processor and magnifying the impact of the high-cost processor.[10]

The Milk Marketing Law gives the Board broad discretion in setting milk prices and in the method for determining such prices. *Finucane v. Pennsylvania Milk*

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[10] Petitioners' also contend that Mr. Herbein's testimony on the cost of school deliveries was not credible. The Board resolved the conflicting testimony on delivery costs. Official General Order, Sept. 22, 1995, Findings of Fact 13, 15. We will not disturb these credibility findings on appeal.

Marketing Board, 615 A.2d 936, 937 (Pa. Cmwlth. 1992); *appeal denied* 534 Pa. 651, 627 A.2d 181 (1993). Petitioners acknowledge that there are many different ways to weigh the cross-section date. Thus, it is not surprising that petitioners' expert witness considered one method to be the optimal method and the staff and dealers recommended another. The same is true of the proffered total-cost distribution versus variable cost approach to the dealer cost data. In each case, the Board's findings are supported by the record. Factual findings, particularly those involving statistical data which are subject to reasonable differences in interpretation, raise technical questions within the Milk Marketing Board's expertise and will not be disturbed on appeal as long as such findings are supported by the record. *Lily-Penn Food Stores, Inc. v. Commonwealth, Milk Marketing Bd.*, 400 A.2d 661, 664 (Pa. Cmwlth. 1979). Accordingly, we will not disturb the Board's order establishing milk prices for Area 1.

/s/ B. Leadbetter
BONNIE BRIGANCE
LEADBETTER, Judge

President Judge Colins dissents.

APPENDIX B

IN THE COMMONWEALTH COURT
OF PENNSYLVANIA

THE SCHOOL DISTRICT OF PHILADELPHIA and CONSUMERS EDUCATION AND PROTECTIVE ASSOCIATION and LANCE HAVER, on behalf of himself and all others similarly situated,	:	NO. 2716 C.D. 1995
Petitioners	:	
v.	:	
PENNSYLVANIA MILK MARKETING BOARD,	:	
Respondent	:	

ORDER

(Filed Oct. 18, 1996)

AND NOW, this 18th day of October ___, 1996, the Official General Order No. A-890 of the Pennsylvania Milk Marketing Board is hereby affirmed.

/s/ B. Leadbetter
BONNIE BRIGANCE
LEADBETTER,
Judge

APPENDIX C

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

THE SCHOOL DISTRICT OF PHILADELPHIA AND CONSUMERS EDUCATION AND PROTECTIVE ASSOCIATION AND LANCE HAVER, on behalf of himself and all others similarly situated,	:	No. 0678 Middle District Allocatur Docket 1996
Petitioners	:	Petition for Allowance of Appeal from Commonwealth Court
v.	:	
PENNSYLVANIA MILK MARKETING BOARD,	:	
Respondent	:	

ORDER

PER CURIAM

AND NOW, this 23rd day of May, 1997, the Petition for Allowance of Appeal is denied.

TRUE & CORRECT COPY

ATTEST: MAY 29 1997

/s/ Joan L. Stehulak
JOAN L. STEHULAK, ESQUIRE
DEPUTY PROTHONOTARY

APPENDIX D

[LOGO]

COMMONWEALTH OF PENNSYLVANIA
MILK MARKETING BOARD

Official General Order No. A-890

Posted: September 22, 1995
Effective: October 1, 1995

ESTABLISHING THE SOUTHEASTERN MILK MARKETING AREA, AREA NO. 1, FIXING MINIMUM PRICES FOR MILK AND CERTAIN MILK PRODUCTS AND OTHERWISE REGULATING THE CLASSIFICATION, MARKETING, AND DISTRIBUTION OF MILK AND MILK PRODUCTS IN AREA NO. 1

The Commonwealth of Pennsylvania, Milk Marketing Board, under the authority conferred by the Milk Marketing Law (Act of July 31, 1968, P.L. 963, No. 294), as amended, hereby orders that all parts of Milk Marketing Board Official General Orders inconsistent with this Official General Order No. A-890 are superseded with respect to the Southeastern Milk Marketing Area, known as Milk Marketing Area No. 1. This Order shall become effective at 12:01 a.m. on October 1, 1995.

SECTION A
SCOPE

This Official General Order shall govern the classification, sale, and distribution of milk within Area No. 1, as defined in section B.

SECTION B
DEFINITIONS

The following words and terms shall have the meanings set forth in this section unless the context clearly indicates otherwise:

Area No. 1 – All municipalities, cities, boroughs and townships located within the counties of Bucks, Chester, Delaware, Montgomery and Philadelphia.

Board – The Milk Marketing Board of the Commonwealth, as created by Section 201 of the Law (31 P.S. § 700j-201).

Consumer – As defined in Section 103 of the Law (31 P.S. § 700j-103).

Cooperative – As defined in Section 103 of the Law.

Dealer – As defined in Section 103 of the Law (definition of " 'milk dealer' or 'handler' ").

Dispenser Milk – Milk packaged in a container from which it is ultimately sold and dispensed to consumers exclusively for on-premise consumption.

Fluid Milk Product – As defined by applicable federal market orders.

Fluid Cream Product – As defined by applicable federal market orders.

Full Service Delivery – Delivery of Class I or II price-controlled packaged products to an individual stop, in connection with which the seller provides one or more of the following services: taking the delivered products from the dock to the dairy case or cooler, stocking cases

with the delivered products, pricing the delivered products, rotating stock, removing leakers and defective products, taking inventory and ordering products to be delivered.

Law – The Milk Marketing Law (31 P.S. §§700j-101 – 700j-1204).

Limited-Service Delivery – Delivery of Class I or II price-controlled packaged products to one specified point used normally for the receiving of food products, with the purchaser being responsible for any further handling of the products and the seller providing none of the services associated with full service delivery.

Multi-Store Group – Three or more stores that satisfy the requirements in Section F, Provision 7.

Over-Price Premium – A price in excess of the mandated producer price that is paid to a producer or producer cooperative for all classes of milk.

Person – As defined in Section 103 of the Law.

Price-controlled Packaged Products – All packaged Class I and Class II milk products listed on Milk Marketing Area price sheets issued by the Board, when these products are sold in Pennsylvania.

Primary Supplier – A milk dealer making a wholesale sale of Class I or II price-controlled packaged products to a multi-store group for a price that is discounted under Section F, Provision 7, based on the volume of sales by that milk dealer to the multi-store group.

Producer – As defined in Section 103 of the Law.

Rounding – A uniform method for expressing a price to the fourth decimal place. If the fifth decimal place is five or more, the fourth decimal place is increased by one. If the fifth decimal place is less than five, the fourth decimal place is unchanged. Example: $1.05655 becomes $1.0566 and $1.0565499 becomes $1.0565.

School – A public or private educational institution serving any grade levels between kindergarten and grade 12.

Secondary Supplier – A milk dealer making a wholesale sale of Class I or II price-controlled packaged products to one or more stores within a multi-store group for a price that is discounted under Section F, Provision 7, based on the volume of sales by the primary supplier to the multi-store group.

Subdealer – As defined in Section 103 of the Law.

Wholesale Sale – The sale of Class I or II price-controlled packaged products by a person other than a producer to a person other than a consumer.

SECTION C
CLASSIFICATION OF MILK

Milk shall be classified according to the terms of Federal Milk Marketing Order No. 4 or other applicable federal or state marketing orders.

SECTION D
MINIMUM CLASS PRICES

PROVISION 1 – CLASS PRICES

For each month, the minimum class prices for each hundred-weight of all milk containing 3.5% butterfat delivered or made available on consignment or otherwise to milk dealers to be sold, resold, or utilized shall be the prices established, announced, and published under federal law and the federal regulations applicable to the milk being priced under the governing federal order. The Class I price shall be increased by any Board-mandated premium.

PROVISION 2 – FLUID MILK SALES OUTSIDE PENNSLYVANIA

The producer price for all fluid milk produced in Pennsylvania, processed, bottled, or packaged, and sold or disposed of outside Pennsylvania as fluid milk (PMMB Class I equivalent) will be determined as follows: The producer price for milk of similar use prevailing in the market area in which the milk is ultimately sold will be ascertained by the Board and announced not later than the fifth day of each month, or the prior business day if the fifth day is a Saturday, Sunday, or holiday.

PROVISION 3 – BUTTERFAT DIFFERENTIALS; DIRECT DELIVERY DIFFERENTIAL

The butterfat differentials and the direct delivery differential established under federal law and the applicable federal regulations for the federal milk marketing orders affecting Area 1 are incorporated herein.

PROVISION 4 – USE OF EQUIVALENT PRICE

If a price quotation used in determining a class price or the butterfat differential is not available, the Board will determine and use an equivalent price.

PROVISION 5 – SALES IN OTHER AREAS

The producer price of milk will be determined according to the Official General Order for the milk marketing area in which the milk is located when it leaves the selling dealer's control. Milk will be presumed to leave the selling dealer's control upon:

(a) Arrival at the destination point designated by the purchaser if the seller incurs the costs of delivery;

(b) Placement on the seller's dock if the purchaser takes possession using:

(1) Equipment owned or leased and personnel employed by the purchaser; or

(2) A trucking company that is independent from the seller. In determining whether a trucking company is independent from the seller, the Board will consider the totality of the relationship between the seller and the trucking company, including whether the seller:

(A) Owns any interest in the trucking company and, if so, the extent of such interest;

(B) Shares common directors, officers, management personnel or employees with the trucking company;

(C) Uses equipment or facilities in common with the trucking company;

(D) Shares common accounting, purchasing, accounts receivable or billing operations with the trucking company;

(E) Has common financing or credit arrangements with the trucking company.

SECTION E
PAYMENTS TO PRODUCERS

The amount owed by a milk dealer to a producer shall be determined as follows:

(a) The number of pounds of milk and butterfat handled, sold, used or disposed of by the milk dealer for each class of milk as defined in Section C shall be totaled by Class and adjusted for milk received from sources other than producers as set forth in 7 Pa. Code Chapter 143.

(b) The adjusted total pounds of milk and butterfat handled, sold, used or disposed of by the milk dealer for each class of milk as determined under Subsection (a) shall be multiplied by the prices and butterfat differential prescribed in Section D using the weighted average butterfat test of the milk used for each classification.

(c) The total value of all classes of milk as determined under Subsection (b) shall be divided by the total pounds of milk and butterfat received by the milk dealer from producers to determine the "blended rate per hundred pounds of milk."

(d) The milk dealer shall pay each producer from whom the milk dealer received milk according to 7 Pa. Code Chapter 143. When payment to producers is made under the terms of a federal market order, the Board will

recognize appropriate deviations from the calculations in subsections (a), (b) and (c).

(e) No deductions or assessments of any kind, type or nature whatsoever shall be made from the producer prices set forth in this Order unless permission in writing is first received from the producer. All such deductions shall be itemized in detail on the monthly statement to producers.

(f) A monthly statement shall be rendered producers in accordance with 7 Pa. Code § 143.14.

(g) In the case of any handler making payments to producers through the operation of a marketwide pool, the board will recognize such pool debits and/or credits to the accounts of such handlers. Payments for marketing services by federal market administrators and assessments for Order administration will not be recognized as a payment to producers.

SECTION F
RESALE PRICES

PROVISION 1 – MINIMUM RESALE PRICES

Subject to the remaining provisions of this section, the minimum wholesale and retail prices for Class I or II price-controlled packaged products sold or made available in Area 1 by persons other than producers shall be as set forth in Subsections (a) – (c). Wholesale sales and retail sales in any other milk marketing area shall be paid for in accordance with the prices established for that area.

(a) The minimum wholesale prices described in Schedule I of this Order are the prices applicable to a

wholesale sale of packaged, including bulk packaged, Class I or Class II fluid milk products and fluid cream products, or both. The minimum prices set forth in Schedule I may be reduced by any applicable discount set forth in the succeeding provisions of this section, PROVIDED that all such reductions shall be rounded in accordance with the definition of "rounding" in Section B. *Return for credit of nondefective, including out of code or in code, Class I or II price-controlled packaged products is prohibited under any circumstances or pricing scheme.*

(b) The minimum retail out-of-store prices prescribed in Schedule II of this Order are the minimum prices to be charged by and paid to a store by a consumer who purchases a Class I or Class II price-controlled packaged product, or both, for off-premise consumption or use. These prices are applicable irrespective of off-premise use by the consumer.

(c) The minimum retail home-delivered prices prescribed in Schedule II, footnote 4 of this Order are the minimum prices to be charged and paid when the product purchased is delivered by a milk dealer or subdealer to a consumer. These prices are applicable irrespective of ultimate use by the consumer and apply to all sales to a consumer except those as defined in Subsection (b).

PROVISION 2 – RESALE PRICE ADJUSTMENT

The minimum resale prices for all products, including light, sour, medium and heavy cream, prescribed in schedules I and II of this Order will be adjusted upward or downward with movements in the Class I price, the butterfat differential, and the prevailing area milk cost.

PROVISION 3 – PREVAILING AREA MILK COST

The prevailing area milk cost will be determined on a monthly basis in the following manner:

(a) All dealers selling milk in Area 1 shall report to the Board monthly the total amount paid for producer milk, including all premiums, handling fees, quality or service premiums or other costs directly associated with procurement of milk from producers for the previous month and the volume of all classes of milk which they purchased for resale in Area 1.

(b) Monthly, the Board will compute the average over-price premium of classes of milk purchased for processing and resale in Area 1.

(c) The prevailing area milk cost for any month shall be the weighted average over-price premium for the third month preceding that month plus the current price of Class I milk purchased for processing and resale in Area 1.

(d) Any special fees, assessments, or other charges imposed on milk dealers by Pennsylvania or the federal government will be recognized in the computation of resale prices for Area 1, PROVIDED that these fees, assessments, or other charges are based on the amount of Class I milk sold or handled in Pennsylvania by the milk dealers, and PROVIDED further that these fees, assessments, or other charges are not currently recognized in the computation of resale prices for Area 1.

(e) The prevailing area milk cost shall be published not later than the fifth day of the month preceding the month in which that cost shall be in effect or on the prior

business day if the fifth day is a Saturday, Sunday, or holiday.

PROVISION 4 – PRICING MULTIPLE UNIT PACKAGES

(a) When two quart containers are fastened together for sale as a half-gallon package or when two half-gallon containers are fastened together for sale as a gallon package, the resulting package may be sold at the prices established for paper one-half gallons and plastic gallons, respectively, on Schedules I and II of this Order plus $.01.

(b) When a package comprised of two quarts fastened together is offered for sale as a half-gallon and when a package comprised of two single half-gallons fastened together is offered for sale as a gallon, the package so offered shall be marked in such a manner that when separated, the component parts thereof shall be clearly identified as integral parts of the larger single package. For example: One of the quart containers may be marked "HALF" and the remaining quart container may be marked "GALLON"; one of the half-gallon containers may be marked "ONE," the other half-gallon container "GALLON"; or the word "TWIN" may be marked on one container and the word "PACK" may be marked on the other.

(c) A package must be fastened together by one of the following means:

(1) Stapled at the plant in such a manner that separation of the package would be clearly evident;

(2) Glued at the plant in such a manner that separation of the package would be clearly evident;

(3) Fastened at the plant by a nonperforated handle that is glued or stapled to both components of the package in such a manner that separation of the package would be clearly evident; or

(4) Taped at the plant by a heat sealing process so that separation of the package would be clearly evident.

PROVISION 5 – EXEMPTIONS FROM BULK RESALE PRICING PROVISIONS

The following sales of bulk milk or bulk cream or both are exempt from the resale prices set forth in schedule I of this Order:

(a) Any sale of bulk cream in excess of 320 quarts per sale;

(b) Any sale of bulk milk or bulk cream (sweet or sour) to a *manufacturer of food products,* PROVIDED the milk or cream is used exclusively for the manufacture of food products at the plant or plants of the manufacturer and no fluid milk or cream is moved from the manufacturing location;

(c) Any sale to a bakery, hotel, restaurant, hospital, or institution which operates a commissary separate and apart from its other accommodations. "Separate and apart" as used herein means separately housed and completely detached from other accommodations.

(d) This Provision is not applicable to any sales in which the buyer takes physical possession of bulk milk dispenser cans or containers, gallon, half gallon, quart, pint, one-third quart, half pint, or other similar containers for which a price is established by this Order.

(e) Any sale made under this Provision cannot be used in computing the average daily delivery under the bulk pricing in Schedule I of this Order.

(f) A dealer making sales under this Provision, whether cash or credit, shall be required to have readily available for inspection by personnel of the Board, for a period of two (2) years, the following:

(1) Exact location of the manufacturing plant(s) where products were utilized;

(2) The selling price and quantity of any product sold under this Provision together with the price and quantity of any other products sold; and

(3) A record from which the Board can readily ascertain the method by which the sales price was determined.

PROVISION 6 – LIMITED SERVICE DISCOUNT

(a) A person making a wholesale sale of Class I or II price-controlled packaged products by means of limited service delivery as defined in Section B may reduce the prices set forth in Schedule I of this Order by

(1) 4% if the weekly average delivery to an individual stop is at least 400 quarts;

(2) 7% if the weekly average delivery to an individual stop is at least 700 quarts; and

(3) 13% if the weekly average delivery to an individual stop is at least 1,200 quarts,

PROVIDED that Subsections (b) through (e) of this Provision are complied with.

(b) For purposes of this Provision, the weekly average delivery shall be the total number of quarts of Class I or II price-controlled package products, net of returns of defective products, delivered to or picked up by the purchaser at an individual stop for resale in the original package divided by the number of actual deliveries of price-controlled packaged products made from 12:01 a.m. on Monday to 12:00 midnight on the following Sunday. Each seller making a wholesale sale may consider only that seller's own sales and not sales by other sellers in determining whether the purchaser qualifies for a price reduction under this Provision.

(c) All Class I or II price-controlled packaged products sold and purchased under this Provision shall be purchased for resale or use in Area 1.

(d) The price reductions set forth in this Provision shall apply only when an order for Class I or II price-controlled packaged products is placed by the purchaser at least a day before each delivery.

(e) Empty cases or containers shall be assembled by the purchaser for convenient pickup by the seller.

PROVISION 7 – MULTI-STORE DISCOUNT: QUALIFICATIONS

(a) Three or more stores may form a multi-store group provided all of the following are satisfied:

(1) The stores are owned by the same person or persons, are operated under franchises granted by the same franchiser, or purchase Class I or II price-controlled packaged products pursuant to a contract with the same contracting entity;

(2) All invoices for Class I or II price-controlled packaged products purchased by the stores are received and processed by the common owner, franchiser, or contracting entity. Payment for all Class I or II price-controlled packaged products purchased under a multi-store discount is guaranteed by the common owner, franchiser, or contracting entity;

(3) Each store receives an average of 400 quarts of Class I or II price-controlled package products per delivery; and

(4) The primary dealer files with the Board a sworn statement listing the name and address of each store in the multi-store group and the aggregate weekly volume of purchases of Class I or II price-controlled package products for all stores in the multi-store group. The multi-store group may file the information required by this paragraph if the primary dealer fails to do so.

(5) The primary dealer serving a qualified multi-store group must provide to each member store of the group a letter certifying that the multi-store group qualifies for the discount based upon its stated volume transactions with that same primary supplier.

(b) A milk dealer making a limited service wholesale sale of Class I or II price-controlled packaged products to a multi-store group may reduce the prices set forth in Schedule I by:

(1) 4% if the average number of quarts per delivery for each store within the qualified multi-store group is at least 400 quarts.

(2) 7% if the average number of quarts per delivery for each store within the qualified multi-store group is at least 700 quarts.

(3) 13% if the average number of quarts per delivery for each store within the qualified multi-store group is at least 1,200 quarts.

(c) The average number of quarts per delivery for each store in the multi-store group shall be determined by dividing the total number of quarts of Class I and Class II price-controlled packaged products (net of returns of defective products) delivered to each member store in the multi-store group for resale in the original package by the number of actual deliveries of price-controlled packaged products to that same member store between 12:01 a.m. on Monday at 12:00 midnight on the following Sunday. Based on the average volume, each member store may qualify for the discounts noted in Subsection (b).

(d) The total volume for the multi-store group as a whole shall be determined by the total number of quarts of Class I and Class II price-controlled packaged products (net of returns of defective product) delivered to all qualified stores within the group, for resale in the original package, between 12:01 a.m. on Monday to 12:00 midnight on the following Sunday. This total shall determine the level of discount provided for in Provision 9.

(e) Volumes by any other dealer qualifying as a secondary supplier shall not be used to compute either the total volume for the multi-store group or the individual volume for each store within the group.

PROVISION 8 – MULTI-STORE GROUP: SECONDARY SUPPLIER

(a) A secondary supplier making a wholesale sale of Class I or II price-controlled packaged products to a store that is a member of a multi-store group may reduce the prices set forth in Schedule I of this Order by the same percentage that the primary supplier is permitted to reduce its prices.

(b) A secondary supplier selling Class I or II price-controlled packaged products to a member of a multi-store group must comply with all the requirements set forth in this Order that apply to the primary supplier except for the volume of purchases.

(c) A secondary supplier may be the exclusive supplier for an individual store within a multi-store group as long as all other requirements specified in Provisions 7 through 9 are satisfied.

(d) A secondary supplier must obtain and keep available for inspection and copying by Board personnel a copy of the certification letter provided by the multi-store group's primary dealer as required in Provision 7, Subsection (a), Paragraph (5), to one or more members of the group that the secondary supplier is servicing.

PROVISION 9 – MULTI-STORE GROUP: ADDITIONAL DISCOUNT

(a) A primary supplier or a secondary supplier making a wholesale sale of Class I or II price-controlled packaged products to a multi-store group on a limited

service basis may reduce the prices set forth in Schedule I by an additional

(1) 1% of the total amount due prior to the application of the discount set forth in Provision 7 if total deliveries to the multi-store group are in excess of 10,000 quarts per week; or

(2) 2% of the total amount due prior to the application of the discount set forth in Provision 7 if total deliveries to the multi-store group are in excess of 100,000 quarts per week.

(b) The additional discount permitted by the Provision may be given to the common owner, franchiser, or contracting entity only and not to the individual store members of the multi-store group. A common owner, franchiser, or contracting entity that accepts the additional discount permitted under this Provision guarantees payment to the primary supplier or the secondary supplier or both.

PROVISION 10 – SCHOOL DISCOUNT

(a) A person making a wholesale sale of Class I or II price-controlled packaged products may, when the products are to be delivered on a limited service basis, reduce the prices set forth in Schedule I of this Order by 4 percent if the weekly average delivery to individual schools is at least 275 quarts. Schools may also receive the limited service discounts set forth in Provision 6.

(b) For purposes of this Provision, the weekly average delivery shall be the total number of quarts of Class I or II price-controlled packaged products delivered to an individual stop or picked up by the purchasing school for

resale in the original package divided by the number of actual deliveries or pickups made from 12:01 a.m. on Monday to 12:00 midnight on the following Sunday. Each seller making a wholesale sale may consider only that seller's own sales and not sales by other sellers in determining whether the purchasing school qualifies for a price reduction under this Provision.

(c) The price reductions provided for in this Provision are subject to the same restrictions and limitations outlined in Provision 6.

(d) This Provision is applicable to any sales of dispenser milk as priced in the dispenser section of Schedule I.

PROVISION 11 – LICENSEE TO LICENSEE DISCOUNTS

(a) A licensed milk dealer selling Class I or II price-controlled packaged products to a milk dealer or subdealer may reduce the prices set forth in Schedule I of this Order by:

(1) 15% if the buyer takes possession of the price-controlled packaged products at a single location per dealer as designated by the dealer or subdealer.

(2) 19% if the buyer takes possession of the Class I or II price-controlled packaged products at the plant where processed and packaged. All sales transacted under this Subsection must be recorded and priced in the home area of the processing dairy.

(b) The price reductions set forth in Subsection (a) may be made only if:

(1) The selling dealer does not pay consideration of any type to the purchaser for services rendered; and

(2) The selling dealer does not provide to the purchaser any labor or other personal service in connection with the transportation for resale of the products purchased. In implementing this paragraph, the Board will use the criteria in Section D, Provision 5, Subsection (b) to determine whether a trucking company is independent from the seller.

PROVISION 12 – DOCK PICK-UP DISCOUNT

(a) A person making a wholesale sale of Class I or II price-controlled packaged products may reduce the prices set forth in Schedule I of this Order by 18 percent when:

(1) The customer purchases at least 4,000 quarts per transaction; and

(2) The customer takes possession of the product at the plant where processed and packaged.

(b) The price reductions set forth in Subsection (a) may be made only if:

(1) The selling dealer does not pay consideration of any type to the purchaser for services rendered; and

(2) The selling dealer does not provide to the purchaser, directly or indirectly, any labor or other personal service in connection with the transportation for resale of the products purchased. In implementing this paragraph, the Board will

use the criteria in Section D, Provision 5, Subsection (b) to determine whether a trucking company is independent from the seller.

PROVISION 13 – NEW TYPES OF MILK OR MILK CONTAINERS

No product or type of milk or cream or size of container for which a price is not specifically prescribed herein shall be used or sold within the Commonwealth until authority is granted by the Board for its use or sale.

PROVISION 14 – RETURNABLE REUSABLE CONTAINER DEPOSIT

A deposit shall be charged and collected on each returnable, reusable container as follows:

	Gallon	One-Half Gallon
Dealer to Wholesale Customer	$0.50	$0.40
Store to Consumer	0.50	0.40
Dealer to Consumer	0.50	0.40

SECTION G
COST REPLACEMENT

Annually, after submission of the Milk Dealer's Financial Statement (PMMB-60), the Board will choose a cross-section of dealers in Area 1 and audit their processing, packaging, delivery and container costs. The audited information with respect to cost will replace existing costs for the aforementioned cost centers for resale prices. The weight given to each dealer's cost will be calculated in the same manner as the method used in the last price

hearing held for Area 1 prior to the audit. After a hearing before the Board, the audited cost found as a result of the hearing will be incorporated into the wholesale price.

SECTION H
INCORPORATION OF REGULATIONS

All provisions of the regulations promulgated by the Pennsylvania Milk Marketing Board are incorporated by reference and made a part of this Official General Order.

SECTION I
SEVERABILITY

If any section, provision, subsection, paragraph, or clause of this Order shall be determined to be unconstitutional or otherwise contrary to law, the remainder of the Order shall be given effect as though that section, provisions subsection, paragraph, or clause had not been included.

PENNSYLVANIA MILK
MARKETING BOARD

/s/ Leon H. Wilkinson
Leon H. Wilkinson,
Chairman

/s/ J. Robert Derry
J. Robert Derry,
Consumer Member

IF YOU REQUIRE THIS INFORMATION IN AN ALTERNATE FORMAT, PLEASE CALL 717-787-4194 OR 1-800-654-5984 (PA RELAY SERVICE FOR TDD USERS).

FINDINGS OF FACT AND CONCLUSIONS OF LAW
AREA 1 PRICE HEARING
JUNE 7, 8, 22, AND 23, 1995

I. Findings of Fact

A. Procedural History

1. In response to an application to amend Official General Order A-863, filed under section 801 of the Milk Marketing Law (Law), 31 P.S. §700j-801, by Lehigh Valley Dairies, Inc., a dealer in Milk Marketing Area 1, the Milk Marketing Board (Board) conducted a price hearing for Area 1 on June 7, 8, 22, and 23, 1995.

2. A notice setting the date and time for commencement of the hearing was published at 25 *Pennsylvania Bulletin* 1815 on May 6, 1995. (Exhibit PMMB-1)

B. Producer Pricing

3. Counsel to the Pennsylvania Farm Bureau (PFB) requested that the current pricing mechanism for establishing producer prices in Area 1 be maintained and observed that existing Board orders enjoy the presumption of validity. (N.T. 10-11) The Board concurs with this unopposed statement but finds that language improvements that appear in producer pricing sections of recently issued official general orders for Areas 5 and 6 should be incorporated in the new Area 1 order (*see* Conclusion of Law 6).

C. Validity of Dealer Cross-Section

4. The cross-section used by Board staff and the petitioner consisted of Balford Farms in Bensalem, Pa.; Lehigh Valley Dairies, Inc. in Fort Washington and Lansdale, Pa.; Readington Farms, Inc. in Whitehouse, N.J.; Rosenberger's Dairies, Inc. in Hatfield, Pa.; and Wawa Dairy in Wawa, Pa. (N.T. 25-27, Exhibit D-1)

5. The Board finds that the cross-section is representative of dealers in Area 1 inasmuch as:

a. The cross-section is geographically diverse, including five dealers within the area and one significant dealer outside the area. (N.T. 26-27, 878-79, Exhibit D-1)

b. The dealers in the cross-section accounted for 62.2% of the total sales of Class I milk in Area 1 during 1994. (N.T. 27-28, Exhibit D-2)

c. The dealers in the cross-section sell milk in various container sizes that are representative of the containers sold by dealers in Area 1. (N.T. 28-30, Exhibit D-3)

d. The dealers in the cross-section sell to customer types representative of Area 1, namely, supermarkets, convenience stores, mom and pop stores, schools, and institutions such as hospitals and nursing homes. (N.T. 90-91, 407)

e. Inclusion in the cross-section of both high-cost and low-cost dealers is appropriate in that these dealers represent significant portions of cross-section sales. (N.T. 961)

D. Wholesale Prices

6. Board staff and the petitioner presented exhibits showing the average costs of the cross-section dealers in 1994 for various sizes of containers. The data in the exhibits are identical except that the staff compiled separate figures for the half-gallon plastic and paper containers and no figure for the three-quart plastic container. (N.T. 38-39, Exhibits Staff-1 and D-4) The Board finds that the costs for the half-gallon paper and plastic containers should be blended and that the blended cost, as well as the costs for all other containers, including the three-quart plastic, shall be as set forth in Exhibit D-4.

7. Board staff and the petitioner presented exhibits showing costs per point, weighted by the percentage of sales method, for the following cost centers: receiving, standardization and pasteurization, bottling, cold room, delivery, and selling (referred to collectively as processing, packaging, and delivery). Both exhibits show a total cost per point of $.1574. (Exhibits Staff-2 and D-5) Robert Havemeyer, testifying for the School District of Philadelphia, offered an alternative methodology for calculating costs-per-point in the receiving, standardization, bottling, and cold room cost centers. His methodology was distinguished principally by emphasizing variable costs rather than fixed costs and weighting every cross-section dealer the same. (N.T. 615-21, 648-49, 657-58, 660-61, Exhibits Havemeyer A-D) The Board finds that the methodology used by Board staff and the petitioner is the soundest and most appropriate way of capturing dealer costs in proportion to actual sales in Area 1 and therefore accepts $.1574 as the cost per quart for processing, packaging, and delivery.

8. The petitioner presented evidence concerning cost increases and decreases for the cross-section dealers during 1994 and part of 1995. A decrease in cost of $.0010 per quart was reported for flavored milk and milk drink; a decrease too insignificant to affect pricing was reported for lowfat and skim products. Reported increases in container costs were plastic gallon – $.0228, dispenser (per quart) – $.0050, half gallon – $.0098, and quart – $.0043. Additional reported increases per quart equivalent were for labor – $.0017, payroll taxes and fringe benefits – $.0004, utilities – $.0003, insurance – $.0009, and other operating expenses – $.0027. Gasoline costs decreased by $.0001 per quart equivalent. (N.T. 52-57, Exhibit D-8) Board staff concurred with the petitioner's figures except for the cost increase of $.0098 for half-gallon containers. Staff calculated a $.0068 cost increase for the paper half gallon, as compared with the petitioner's figure of $.0095, which is more than double the quart equivalent increase of $.0043; using the staff's figure, the combined (plastic and paper) cost increase adjustment for a half-gallon container would be $.0073. (N.T. 880-81, 906-07, Exhibit D-8). The Board finds that the cost increases and decreases reflected in Exhibit D-8, as modified by substitution of $.0073 for the half-gallon container, should be included in calculating wholesale prices.

9. The petitioner recommended that the Board include $.0007 in interest cost per point in the price build-up. (N.T. 60-61, Exhibit D-9) In the absence of conflicting evidence, the Board finds that inclusion of the interest expense reported by the petitioner in the calculation of wholesale prices is appropriate.

10. The petitioner requested cost adjustments based on container filling costs and case volume, as follows: Increases – pint, $.0108; one-third quart, $.0196; half pint, $.0157; four-ounce, $.0202; dispenser, $.5942. Decreases – gallon, $.0336; half gallon, $.0167. No adjustment was requested for the quart. Mr. Herbein testified that the adjustments would be revenue neutral, i.e., that their dollar effect on the cross-section dealers would be minus $2,183. (N.T. 63-65, Exhibit D-10) Mr. DeSantis testified that the impact of a small container adjustment on all Area 1 dealers would not be revenue neutral but would instead yield a profit of $655,428. Although acknowledging that the difference between his conclusion and that of Mr. Herbein was attributable to differences in product mix of all dealers in Area 1 compared to the cross-section dealers – principally with regard to the half pint, which figured more prominently in Mr. DeSantis's study inasmuch as it was based on characteristics of milk for October, a school month – he nonetheless maintained that annualizing October figures would not necessarily reduce the profit he calculated and that characterizing the small container adjustment as revenue neutral based on its effect only on cross-section dealers remains misleading. (N.T. 893, 1052-53, Staff Rebuttal Exhibit) Mr. DeSantis cautioned against having a small container adjustment in Area 1 owing to its uniquely competitive nature. (N.T. 893-94, 909) Notwithstanding its findings in other area price orders that a small container adjustment is justified, the Board finds that similar justification has not been provided for Area 1 and that therefore no such adjustment should be made.

11. Mr. Herbein recommended that dealers receive a rate of return of 3.5% based on cost increases of 3.8%. (N.T. 68-70) Testifying for the School District of Philadelphia, Harold M. Harris, Jr. maintained that 3.5% is about double the industry norm and that the lowest margin permitted by law should apply. (N.T. 292, 295) Mr. DeSantis endorsed a 3.5% margin only if it were calculated solely on operating expenses reflected in Exhibit D-8 – that is, not including raw milk, which dealers do not pay for until after its sale. (N.T. 902-03) The Board finds a significant inconsistency in petitioner's recommending a 3.5% margin based on a cost increase rate associated with operating expenses and then applying that margin to raw milk costs not yet incurred (*see* Exhibits D-6 and D-7). The Board further finds that when the cost of raw milk, which represents on average no less than 60% of the total cost per unit (*see* Exhibits Staff-4 and D-6), is accounted for, the rate of increased costs approximates only 2.4%. The Board concludes therefore that the minimum statutory rate of return – 2.5% – is appropriate.

12. The petitioner proposed that in order to arrive at a proper basic wholesale unit price, cross-section wholesale unit costs should be reduced by the average delivery cost included in that figure, and to that net cost figure should be added delivery costs attributed to small, less efficient deliveries for which no discount is available. (N.T. 72-75; Exhibit D-7, Columns 9 and 10) Both the petitioner and staff found that the weighted average delivery cost for all types of deliveries for cross-section dealers was $.0787 per point. (Exhibits D-5 and Staff-2) The Board adopts this methodology for arriving at basic wholesale unit prices before discounts and finds that the

average delivery cost for cross-section dealers is $.0787 per point.

13. The petitioner studied small stop deliveries of fewer than 400 quarts per delivery for cross-section dealers and determined that the cost of the small delivery was $.1331 per point. (N.T. 111-13, Exhibit D-7) The Board staff also studied this type of delivery for cross-section dealers and arrived at a cost of $.1292 per point. (Exhibit Staff-3) The difference in the two figures was due to Board staff's studying different routes. (N.T. 884-85) The Board finds that although the two figures are equally credible, the cost of $.1292 per point should be used to calculate unit wholesale prices before discount owing to the more competitive nature of Area 1 (*see id.*).

14. Mr. Herbein testified in favor of maintaining the existing discount schedule in Area 1. (N.T. 75-77, Exhibit D-11) Mr. DeSantis offered as an alternative approach converting the current percentage discounts, which falsely imply that discounts are linked to reduced delivery costs, to cents per quart discounts. He testified that the latter system would be more reflective of actual delivery costs and could be combined with the indexing methodology by adjusting the discounts at the indexing period to continue to reflect actual costs. (N.T. 895-97, Exhibit Staff-7) In its brief, however, the staff withdrew, at least for the time being, its recommendation that the Board adopt a cents per quart discounting system (*see* staff brief at 8). The Board finds that the existing percentage discount system should be maintained in Area 1, with the modification for schools addressed in Finding of Fact 15.

15. Mr. Herbein testified in favor of maintaining the school discount at 4% for limited service deliveries of at least 275 quarts, asserting that on average deliveries to schools are more costly than deliveries to stores because of lower volume, time-specific delivery requirements, and seasonality. (N.T. 77-81, 489) Mr. Harris testified that the School District of Philadelphia represents a huge account and should be eligible for discounts greater than 4%. (N.T. 290-91) Mr. Havemeyer calculated a price of from $.1240 to $.1260 for a half pint of milk, as contrasted with the price of $.1794 from Exhibit D-7. He did no study regarding the specific impact of discounting on the price of school milk (N.T. 759-62) Mr. DeSantis testified in favor of supplementing the current 4%/275 quart minimum school discount by allowing schools to receive all other available discounts. (N.T. 897, 924, 1057-59) The Board finds that including schools in the entire discount schedule while maintaining the 4% discount is a prudent and practical way of encouraging schools to increase their efficiencies by, among other things, consolidating their deliveries and will effectively reduce the price of school milk.

16. Mr. DeSantis proposed replacing the bracket system currently in use with an indexing, or cost replacement, system. He explained that the inexactness of the bracket system with regard to correlating the resale price and the raw milk price adversely affects dealers during periods of decreasing milk prices. Cost replacement would enable the Board to update dealer costs that have changed during the year by auditing the dealers' financial statements with regard to significant cost categories such as containers and replacing these costs with the new

costs. All audited costs, including processing, packaging, and delivery costs, would be replaced only after a hearing before the Board. For the first month of a new Area 1 order and for each month thereafter, resale prices would be calculated by adding to the established container and processing costs per unit the fluctuating cost of raw milk and the established dealer margin. These monthly changes would not require a Board hearing. (N.T. 887-89, 1029-32, Exhibit Staff-5) The Board finds that it is appropriate to adopt in the new Area 1 order a provision establishing a cost replacement system characterized by the following:

a. The cost replacement system will monitor ascertainable costs.

b. Costs will be subjected to an auditing process to establish actual validity.

c. Notice of commencement of the cost replacement process will be given to all interested parties for the affected area or areas.

d. All interested parties will have an opportunity to monitor and participate in the development of cost increases and decreases to assure validity and consideration of all factors that may be developed by interested parties.

e. Before adopting a cost replacement change to the prices of any order, the Board will hold a hearing pursuant to section 801 of the Law.

17. Mr. Herbein in Exhibit D-12 presented proposed unit prices for Class II products (half and half, light cream, heavy cream, and sour cream). The proposed

prices represented the sum of the current purchase price for each product, cold room and selling costs per point from Exhibit D-5, small delivery cost per point from Exhibit D-7, and the proposed 3.5% margin. (N.T. 81-83, Exhibit D-12) Mr. Herbein testified further that the Board should establish wholesale and retail prices for products with butterfat contents different from light cream and heavy cream based on the cream cost included or excluded from each product. (N.T. 83) Mr. DeSantis testified that use of the small delivery cost of $.1331 from Exhibit D-7 was inappropriate and should be replaced by the average delivery cost of $.0787 which is used consistently in every other case. (N.T. 898, Exhibit Staff-2) Mr. DeSantis also recommended continuation of the existing practice of extrapolating prices for products not listed on Exhibit D-12 from the prices calculated for existing Class II products. (N.T. 898) The Board, with no evidence to the contrary, adopts the recommendations regarding the use of cream cost as the pricing factor for products with butterfat contents different from light and heavy cream and regarding the extrapolation of prices for new products. The Board finds that the average delivery cost of $.0787 is the appropriate element for inclusion in the calculation of cost per point in Exhibit D-12 and, consistent with Finding of Fact 11, will apply a 2.5% rather than a 3.5% margin to the calculation of unit prices.

18. Mr. Herbein testified in favor of including in the new Area 1 order a provision mirroring the Board's former regulation at 7 Pa. Code §145.27, which required dealers and subdealers to receive Board approval before supplying new accounts. (N.T. 84-88, Exhibit D-13) The

Board took administrative notice of 15 *Pennsylvania Bulletin* 780 (March 2, 1985) and 1915 (May 25, 1985), which, respectively, gave notice of the Board's intention to repeal section 145.27 as embodying a procedure serving no valid public purpose and set out the order of the Independent Regulatory Review Commission approving the repeal and observing that the provision had no regulatory purpose, cast the Board as a collection service for dealers in the Philadelphia area, and put the Board in the position of interfering with the business activities of milk customers not subject to its regulatory powers. Mr. DeSantis concurred with the reasons for the repeal of section 145.27 and recommended that it not be resuscitatied [sic] by way of inclusion in the new Area 1 order. (N.T. 902) The Board finds the testimony unconvincing with regard to reviving a procedure it abandoned for good reason in 1985. Moreover, the Board notes the protection afforded milk dealers by existing section 145.26, which limits extensions of credit to wholesale customers. When the Board decided to abolish section 145.27 it was with the intention of strictly enforcing the preceding section (*see* 15 *Pennsylvania Bulletin* 1915).

19. Mr. DeSantis testified in favor of revising Provision 9 in the current Area 1 order to ease the introduction of new types of containers into the marketplace. In his opinion such a revision would be consistent with the Board's policy of encouraging milk sales. (N.T. 904) In its brief, however, Board staff withdrew its recommendation to revise Provision 9 and suggested instead that the Board consider establishing a price per ounce applicable to all milk marketing areas for new types of containers (*see* staff brief at 11). The Board finds that Provision 9 should be

maintained in its present form; staff's recommendation in its brief will be considered outside the ambit of area price orders.

20. No testimony was received concerning the prevailing area milk cost and returnable reusable container deposit provisions in Official General Order A-863 (*see* Section E, Provisions 2 and 10). The Board notes, however, that these provisions are materially different from companion provisions in other area price orders with regard especially to quality and service premiums in Provision 2 and deposit amounts in Provision 10. The Board finds no reason to maintain these deviations in Area 1 and that therefore the prevailing area milk cost and returnable reusable container deposit provisions should be amended to conform to the language governing other milk marketing areas.

E. Retail (Out-of-Store) Prices

21. Because no testimony was presented to challenge the out-of-store pricing provisions of Official General Order A-863, those provisions are presumed valid under section 801 of the Law and will be maintained in the new Area 1 order (*see* Conclusion of Law 6)

II. Conclusions of Law

1. The June 7, 8, 22, and 23 hearing to set the prices of milk in Milk Marketing Area 1, the Southeastern Milk Marketing Area, was held pursuant to authority granted the Board in section 801 of the Law, which provides in pertinent part that the Board "shall ascertain, after a

hearing . . . prices paid to producers, to dealers, and to stores for milk in the respective milk marketing areas as will be most beneficial to the public interest, best protect the milk industry of the Commonwealth and insure a sufficient quantity of pure and wholesome milk to inhabitants of the Commonwealth. . . . "

2. The hearing was held following adequate notice, and all interested parties were given a reaonable [sic] opportunity to be heard.

3. The cross-section used by the Board staff and the petitioner was reasonable and representative of dealers in the marketplace (*see* Finding of Fact 5).

4. In establishing the proposed Official General Order, the Board considered all relevant unit cost data, based on competent evidence presented at the hearing, and all relevant factors presented to it concerning conditions affecting the milk industry in Area 1.

5. A reasonable rate of return to dealers is 2.5% based upon net sales of price-controlled packaged products determined in accordance with generally accepted accounting principles (*see* Finding of Fact 11).

6. Provisions of Official General Order A-863 that regulate producer and retail out-of-store pricing should be maintained, with language clarifications pursuant to Finding of Fact 3.

7. Adoption of the attached Official General Order is reasonable and appropriate under section 801 of the Law, subject to modifications that the Board approves as

a result of the pre-order conference and recommendations made to the Board thereafter in the manner set forth in the Law.

PENNSYLVANIA MILK
MARKETING BOARD

/s/ Leon H. Wilkinson
Leon H. Wilkinson, Chairman

/s/ J. Robert Derry
J. Robert Derry,
Consumer Member

Dated: September 22, 1995

PENNSYLVANIA MILK MARKETING BOARD
SOUTHEASTERN MILK MARKETING AREA, AREA NO. 1
MINIMUM WHOLESALE PRICES
SCHEDULE I

Oct-95

OGO A-890

DESCRIPTION	PRODUCT CODE	BUTTERFAT % RANGE LOW	BUTTERFAT % RANGE HIGH	BULK PER QT. EQUIV.	NON-RETURNABLE GAL. /1/	3 QT.	1/2 GAL. /2/	QUART	PINT	1/3 QT.	1/2 PT.	4 OZ.
STANDARD MILK	0300	4.01	6.00	0.6217	2.4027	1.8618	1.2210	0.6200	0.3186	0.2182	0.1622	0.0878
STANDARD MILK	0400	3.25	4.00	0.6088	2.3506	1.8228	1.1949	0.6071	0.3120	0.2143	0.1590	0.0863
FLAVORED MILK	0500	3.25	8.00	0.6387	2.4702	1.9124	1.2547	0.6370	0.3270	0.2236	0.1665	0.0899
LOWFAT FLAVORED MILK	0600	0.00	3.24	0.5956	2.2979	1.7832	1.1686	0.5939	0.3055	0.2101	0.1558	0.0845
LOWFAT MILK	0800	2.00	3.24	0.5866	2.2618	1.7561	1.1505	0.5849	0.3010	0.2073	0.1534	0.0834
LOWFAT MILK	0900	0.50	1.99	0.5691	2.1919	1.7038	1.1157	0.5674	0.2923	0.2018	0.1490	0.0813
BUTTERMILK	1000	0.00	6.00	0.5833	2.2486	1.7462	1.1440	0.5816	0.2994	0.2062	0.1526	0.0830
SKIM MILK	1200	0.00	0.49	0.5539	2.1314	1.6584	1.0853	0.5522	0.2847	0.1971	0.1453	0.0793
MIXED MILK /3/	1500	6.01	17.99				1.3698	0.6954	0.3695	0.2550	0.1921	
LIGHT CREAM	1700	18.00	29.99					0.9166	0.5527	0.3087	0.2796	
MEDIUM CREAM	1800	30.00	35.99					0.9231	0.5355	0.3694	0.2997	
HEAVY CREAM	1900	36.00	50.00					1.1396	0.6610	0.4561	0.3699	
SOUR CREAM /4/	1600	18.00	29.99					1.3550	0.6878	0.4746	0.3735	

/1/ DEDUCT $0.06 IF SOLD IN REUSABLE CONTAINER WITH A 50 CENT DEPOSIT.
/2/ DEDUCT $0.04 IF SOLD IN REUSABLE CONTAINER WITH A 40 CENT DEPOSIT.
/3/ MIXED MILK PRICES: 3/8 OZ. - $.014, 1/2 OZ. -$.018, 3/4 OZ. -$.027. ADD $.02 PER QT. EQUIVALENT TO ESTABLISH RETAIL PRICES ON SCHEDULE II.
/4/ SOUR CREAM - 5 LB - 2.8455
10 LB - 5.5555

PENNSYLVANIA MILK MARKETING BOARD
SOUTHEASTERN MILK MARKETING AREA, AREA NO. 1
MINIMUM RETAIL OUT-OF-STORE (CASH AND CARRY)
SCHEDULE II /4/

Oct-95

OGO A-890

DESCRIPTION	PRODUCT CODE	BUTTERFAT % RANGE LOW	BUTTERFAT % RANGE HIGH	BULK PER QT. EQUIV.	NON-RETURNABLE GAL. /1/	3 QT.	1/2 GAL. /2/	QUART	PINT	1/3 QT.	1/2 PT.	4 OZ.
STANDARD MILK	0300	4.01	6.00	0.63	2.43	1.88	1.24	0.63	0.32	0.22	0.17	0.09
STANDARD MILK	0400	3.25	4.00	0.62	2.38	1.85	1.21	0.61	0.32	0.22	0.16	0.09
FLAVORED MILK	0500	3.25	8.00	0.65	2.50	1.93	1.27	0.64	0.33	0.23	0.17	0.09
LOWFAT FLAVORED MILK	0600	0.00	3.24	0.60	2.33	1.81	1.18	0.60	0.31	0.22	0.16	0.09
LOWFAT MILK	0800	2.00	3.24	0.59	2.29	1.78	1.17	0.59	0.31	0.21	0.16	0.09
LOWFAT MILK	0900	0.50	1.99	0.58	2.22	1.73	1.13	0.57	0.30	0.21	0.15	0.09
BUTTERMILK	1000	0.00	6.00	0.59	2.28	1.77	1.16	0.59	0.30	0.21	0.16	0.09
SKIM MILK	1200	0.00	0.49	0.56	2.16	1.68	1.10	0.56	0.29	0.20	0.15	0.08
MIXED MILK	1500	6.01	17.99				1.42	0.72	0.38	0.26	0.20	
LIGHT CREAM	1700	18.00	29.99					0.94	0.57	0.32	0.29	
MEDIUM CREAM	1800	30.00	35.99					0.95	0.55	0.38	0.31	
HEAVY CREAM	1900	36.00	50.00					1.16	0.67	0.46	0.38	
SOUR CREAM /3/	1600	18.00	29.99					1.38	0.70	0.48	0.38	

/1/ DEDUCT $0.06 IF SOLD IN REUSABLE CONTAINER WITH A 50 CENT DEPOSIT.
/2/ DEDUCT $0.04 IF SOLD IN REUSABLE CONTAINER WITH A 40 CENT DEPOSIT.
/3/ SOUR CREAM - 5 LB - 2.92
10 LB - 5.71
/4/ ADD $0.0425 PER QUART FOR HOME DELIVERED MILK

Supreme Court, U.S.
FILED
SEP 22 1997
CLERK

No. 97-327

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

CONSUMERS EDUCATION & PROTECTIVE ASSOCIATION and LANCE HAVER,

Petitioners,

v.

PENNSYLVANIA MILK MARKETING BOARD, LEHIGH VALLEY DAIRIES, INC., ATLANTIC DAIRY COOPERATIVE, PENNSYLVANIA ASSOCIATION OF MILK DEALERS, ROSENBERGER'S DAIRY, INC., CLOVER FARMS DAIRY, and WAWA DAIRY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COMMONWEALTH COURT OF PENNSYLVANIA

BRIEF OF RESPONDENT ATLANTIC DAIRY COOPERATIVE IN OPPOSITION

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September 22, 1997

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PARTIES TO THE PROCEEDING

The petition accurately lists the parties to the proceeding, provided that Land O'Lakes, Inc. is successor in interest to Atlantic Dairy Cooperative by reason of a merger effective April 1, 1997. The former Atlantic Dairy Cooperative is operated as Land O'Lakes, Inc. Eastern Milk Operations.

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No. 97-327

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

CONSUMERS EDUCATION & PROTECTIVE ASSOCIATION and LANCE HAVER,

Petitioners,

v.

PENNSYLVANIA MILK MARKETING BOARD, LEHIGH VALLEY DAIRIES, INC., ATLANTIC DAIRY COOPERATIVE, PENNSYLVANIA ASSOCIATION OF MILK DEALERS, ROSENBERGER'S DAIRY, INC., CLOVER FARMS DAIRY, and WAWA DAIRY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COMMONWEALTH COURT OF PENNSYLVANIA

BRIEF OF RESPONDENT ATLANTIC DAIRY COOPERATIVE IN OPPOSITION

STATEMENT OF THE CASE

The petition seeks this Court's review of a decision of the Commonwealth Court of Pennsylvania ("Commonwealth Court") that the Pennsylvania Milk Marketing Law does not violate the Commerce Clause of the United

States Constitution. Several Respondents have filed briefs setting forth in detail the factual background of this case. To avoid repetition, this brief will summarize the significant factual background and the Court is respectfully referred to the briefs of the several Respondents for a more detailed review of the factual background.

The Commonwealth Court affirmed a General Order of the Pennsylvania Milk Marketing Board ("PMMB") which established minimum wholesale prices for milk in Pennsylvania Milk Marketing Area No. 1 (Philadelphia area). The General Order included prices charged to the School District of Philadelphia. The PMMB's original order was issued in September, 1995, was amended in October, 1995, and was based upon a hearing record which encompassed several days of hearings. Petitioners, together with the School District of Philadelphia, were petitioners before the Commonwealth Court and together sought review by the Pennsylvania Supreme Court which denied their petition for review on May 23, 1997. The School District of Philadelphia has not joined in this Petition for a Writ of Certiorari.

A. The Pennsylvania Milk Marketing Law.

The sale of milk in Pennsylvania is regulated by the Pennsylvania Milk Marketing Law ("the Law"), 31 Purdon's Pennsylvania Consolidated Statutes Annotated § 700j-101, et seq. The PMMB, an independent agency, is charged with implementation of the Law. The Law provides that the PMMB will set minimum prices for the wholesale and retail sale of milk by official order. (Section 802). These minimum prices are to be based upon "all conditions affecting the milk industry . . . including the amount necessary to yield a reasonable

return . . . on aggregate milk sales by milk dealers or handlers and stores selling milk". (Section 801) Prices are set based upon a hearing record, and the PMMB considers several factors including costs incurred by a cross section of dealers selling in the area. The rate of return allowed to such milk dealers is set forth in section 801 of the Law at two and one-half percent to three and one-half percent "based on net sales of price-controlled products determined in accordance with generally accepted accounting principles."

B. Procedural History.

Upon application of Respondent, Lehigh Valley Dairies, Inc., the PMMB held an evidentiary hearing which lasted for several days in June, 1995. The hearing record established that the Philadelphia Milk Marketing Area No. 1 is a competitive market with substantial competition from milk dealers based in Pennsylvania as well as New Jersey. The cross section of milk dealers utilized by the PMMB even included a New Jersey dealer.

At the hearing, the School District of Philadelphia sought a reduction of five cents in the price of half-pint containers of milk utilized by the School District and offered evidence that milk prices charged in Pennsylvania are higher than milk prices charged in parts of neighboring states. The School District of Philadelphia offered evidence that a milk dealer from which it purchases half-pints of milk also sells half-pints to urban schools in New Jersey at approximately four cents less per half-pint than it is required to pay under the PMMB's official order.

Based upon the hearing record, Official General Order A-890 was issued by the PMMB effective October 1,

1995. The Official General Order reduced half-pint prices for milk sold to schools by approximately one and one-third cents.

REASONS FOR DENYING THE WRIT

The petitioners' claim does not warrant review by this Court. The decision by the Court below that the Pennsylvania Milk Marketing Law does not violate the Commerce Clause of the United States Constitution was a plainly correct application of long settled law. There is no conflict between the circuits.

1. In *Milk Control Board v. Eisenberg Farm Products,* 306 U.S. 346, 59 S.Ct. 528, 83 L.Ed. 752 (1939), this Court considered the constitutionality of the Pennsylvania Milk Control Law and found that minimum prices established on milk purchased by an out-of-state dealer from a Pennsylvania milk producer, where the milk goes into interstate commerce, does not violate the Commerce Clause of the United States Constitution. In *Sylvan Seal Milk, Inc. v. Milk Control Commission,* 246 F. Supp. 1001 (E.D. Pa. 1967), the District Court found no substantial constitutional questions as to the validity of the Pennsylvania Milk Control Law. Thus, we start with well reasoned decisions that Pennsylvania Milk Control Law is not, per se, unconstitutional. See also, *Penn Dairies, Inc. v. Milk Control Commission,* 318 U.S. 261, 63 S.Ct. 617, 87 L.Ed. 748 (1943).

In regulating commerce among the several states, the Commerce Clause limits the power of the several states to enact laws which discriminate against or impose unjustifiable burdens on interstate commerce. This interpretation is clear and well settled. However, state statutes the effect of which is to impose only an inci-

dental burden on interstate commerce have been recognized to be an unavoidable result of a state's legislative effort to protect the health and safety of the inhabitants of the state. *Philadelphia v. New Jersey,* 437 U.S. 617, 98 S.Ct. 1231, 57 L.Ed.2d 475 (1978). Such statutes are valid and must be distinguished from state statutes that affirmatively discriminate against interstate commerce. *Maine v. Taylor,* 477 U.S. 131, 106 S.Ct. 2440, 91 L.Ed.2d 110 (1986). In *Eisenberg, supra,* this Court recognized that state statutes exercising the state's police power will necessarily have some effect upon interstate commerce but so long as it only incidentally or indirectly burdens interstate commerce it does not violate the commerce clause. It is also clear and well settled that where a statute even-handedly affects both in-state and interstate interests, but does not prohibit the flow of interstate goods, place added costs upon them or distinguish between in-state and out-of-state companies in the retail market, the statute does not discriminate against interstate commerce. *Exxon Corporation v. Governor of Maryland,* 437 U.S. 117, 98 S.Ct. 2207, 57 L.Ed.2d 91 (1978), *Ford Motor Co. v. Insurance Com'r. of Comm. of PA,* 874 F.2d 926 (3rd Cir. 1989); *Norfolk Southern Corp. v. Oberly,* 822 F.2d 338 (3rd Cir. 1987).

The United States District Court for the Middle District of Pennsylvania has found that the Pennsylvania milk control statute does not burden, and has only an incidental effect upon, interstate commerce. *United Dairy Farmers Coop. Assoc. v. Milk Control Commission,* 335 F. Supp. 1008 (M.D. Pa. 1971), *aff'd,* 404 U.S. 930, 92 S.Ct. 280, 30 L.Ed.2d 244 (1971).

2. Petitioners "protectionist" argument is without merit. The statute treats in-state and out-of-state, efficient and inefficient, dealers the same. The same burdens fall equally upon in-state and out-of-state dealers and the fact that those out-of-state dealers who do business in Pennsylvania are affected by the statute does not constitute discrimination in violation of the Commerce Clause. *Exxon Corporation v. Governor of Maryland,* supra; *Norfolk Southern Corp. v. Oberly,* supra.

3. Local interests are promoted by the Milk Control Law and outweigh any incidental burden on interstate commerce. The Legislature of the Commonwealth of Pennsylvania has reconsidered milk price controls on several occasions and has decided that price controls are necessary to promote the overall regulatory scheme. A legitimate state objective is discernable from the Legislative Purpose and Preamble to the Law. The purpose is stated to be, inter alia, "the protection of the public health and welfare and for the prevention of fraud". 31 Pa. C.S.A. §700j-101. The Legislature also set forth in the Preamble to the Law that the milk industry in Pennsylvania is "a business affecting the public health and affected with the public interest". Since milk is a vital commodity in Pennsylvania and the Legislature found that an adequate supply at a stable price is required for the benefit of the inhabitants of the state, retail minimum price controls are ā rational means to achieve that objective. *Finucane v. PA Milk Marketing Board,* 582 A.2d (1152 Pa. Cmwlth. 1990).

CONCLUSION

For the reasons given above, the petition should be denied.

Respectfully submitted,

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Dated: September 22, 1997

Supreme Court, U.S.
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No. 97-327

IN THE

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QUESTION PRESENTED

Does a state law violate the commerce clause of the U.S. Constitution because it establishes minimum resale prices within the state for milk products based upon costs of a representative cross section of milk producers serving the market, including in-state and out-of-state processor costs, where the state market is open to all processors at or above the determined prices?

PARTIES TO THE PROCEEDINGS, RULE 14.1(b)

The parties upon whose behalf this Brief is filed are Lehigh Valley Dairies, Inc., the Pennsylvania Association of Milk Dealers, Rosenberger's Dairy, Inc., Clover Farms Dairy, and Wawa Dairy.

The parent corporation of Lehigh Valley Dairies, Inc. is Lehigh Enterprises Acquisition Corp., a wholly owned subsidiary of Mid-America Dairymen, Inc.

Wawa Dairy is an operating Division of Wawa, Inc.

Other than noted, the parties have no other parent companies nor nonwholly owned subsidiaries.

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TO THE HONORABLE SUPREME COURT:

The Respondents, Lehigh Valley Dairies, Inc., Pennsylvania Association of Milk Dealers, Rosenberger's Dairy, Inc., Clover Farms Dairy, and Wawa Dairy respectfully

request that this Court deny the Petition for Writ of Certiorari submitted by Petitioners.

COUNTERSTATEMENT OF THE CASE

Petitioners' Statement is inaccurate in asserting that the Pennsylvania Milk Marketing Law (the "Law"; Act of April 28, 1937 P.L. 417, as amended, 31 P.S. §700j-101 to 700j-1302) mandates retail prices paid by consumers to milk processors. Petition at p. 2. Rather, the Law sets the wholesale prices at which processors sell milk to stores (in this instance, the Philadelphia School District) and prices then applicable to sales from stores to consumers. *See* 31 P.S. §700j-802. The children of Philadelphia do not buy milk from processors; they buy from the School District.

Petitioners presume to speak for the interests of the School District of Philadelphia and equate its interest with that of attending children. Petitioners contend that over 90% of the milk purchased by the School District is "given" to children attending the District. In actuality, the Director of Food Services of the District provided illuminating information about what the District charges for school meals and what it recoups. The Director revealed that the District's cost for food at lunch is $.95 or $.72 per meal (App., 3a), but that the payment it receives, whether from the federal government, the state, or children who purchase their own food, is between $1.38 and $1.86 (App., 2a-3a).

The Director of Food Services also revealed a startling fact that whenever the District sells over-the-counter food, its standard mark-up is 100% (App., 1a). Thus, if the District buys a half pint of milk for $0.175, the price to students is doubled to $0.35 (App., 1a). Indisputably, the record provides no support for any assertion

that the District "gives" milk or any other food to children nor that milk prices are truly contributing to any condition of economic extremis for the School District of Philadelphia.

Petitioners also state that the average price developed under the Milk Marketing Law "is derived by reference to *only* local producers."[1] Petition at p. 4. This is a misstatement of fact since the five companies in the cross-section used to determine Pennsylvania minimum prices included a New Jersey processor, Readington Farms. As the witness for the Pennsylvania Milk Marketing Board (PMMB or "the Board") staff pointed out, eastern Pennsylvania is a highly competitive area with a specific New Jersey influence which staff did not want the Board to overlook. As a result, Readington Farms, as a large and efficient dealer, was selected as a representative of the out-of-state influence. (App., 4a-5a). The implication sought by Petitioners, that Pennsylvania prices are predicated upon only local producers, is therefore flatly incorrect in that the cross-section utilized by the Board represented not only in-state dealer costs but also the costs of out-of-state production as well.

In recognition of its responsibility to consider all factors which affect the eastern Pennsylvania market, the Board thus reflected in its pricing order a combined influence of in-state and out-of-state costs. (App., 4a-5a). In addition, the originating case below was a general price hearing which was conducted following full public notice and opportunity to be heard by all interested

---

[1] Petitioners' Brief frequently confuses the term, "producers" with "dealers." As defined in the Law and as used in the milk industry generally, producers are dairy farmers and milk processing companies are dealers. See 31 P.S. 700j-103.

parties, either in-state or out-of-state. There is also no evidence whatever that the administrative proceeding below was commenced in retaliation for the suit of the School District, *School District of Philadelphia v. Pennsylvania Milk Marketing Board,* 877 F. Supp. 245 (E.D. Pa. 1995) nor is there any evidence that the School District dropped pursuit of that litigation. In fact, by order of court, the School District was dismissed from the case. *See* 877 F. Supp. at 254.

It is also appropriate to point out that the School District of Philadelphia has not filed any brief in support of the Petition, nor have any out-of-state dealers who, Petitioners have claimed, are disadvantaged by the Law.

Finally, Petitioners quote a PMMB staff witness, that the "price [set by PMMB] is exorbitant," to criticize the Board's dealer cross-section, which is taken entirely out of any accurate or proper context. Petition at p. 4. Petitioners' characterization erroneously asserts that this expert testified that the price of milk resulted from inflated costs of producers in the cross-section. Actually, the quote pertained to a question relating solely to the elasticity of milk demand and is accurately set forth as follows:

> Q. Finally, just one more question. Again, referring to Mr. Herbein's testimony, he was asked on cross examination what effect significant reductions in prices would have on the marketplace and on consumer behavior. How would you answer that same question?
>
> A. Knowing that the market price for milk, the MW price, fluctuates throughout the year, we are aware that consumption patterns do not mirror those changes significantly, so that we would say that consumption patterns are not overly affected by changes

in pricing. It takes just as much milk to put on your Cheerios if it's $2.00 a gallon as $2.10. So, we think that milk is relatively inelastic and thus the price is exorbitant.

(App. 5a-6a)

The witness was *not* commenting in any way upon prices proposed for the order nor upon the dealer cross-section at this point in his testimony. In fact, he gave the following testimony regarding the appropriateness of the cross-section:

Q. That all depends on whether or not the cross-section is representative of something. It's got to be representative of something. Correct?

A. We believe the cross-section we selected is representative of milk marketing Area 1, period.

(App., 7a) Petitioners have lifted the quote from one section of the transcript and presented it in the context of entirely unrelated testimony.

In short, the record has been inaccurately restated by Petitioners. The record, as cited above, reflects even-handed application of a facially nondiscriminatory milk marketing law.

SUMMARY ARGUMENT IN OPPOSITION TO CERTIORARI

The Petition for Writ of Certiorari should be denied. In Pennsylvania, the sale of milk is regulated and controlled by the Milk Marketing Law, *supra.* The Law is implemented by the Milk Marketing Board, an independent administrative agency which fixes minimum prices for milk sold by farmers, milk sold at wholesale, and retail out-of-store milk. 31 P.S. 700j-101 *et seq.*

This Court has twice upheld the constitutionality of the pricing provisions of the Law as an appropriate exercise of the police powers of the Commonwealth of Pennsylvania. *Milk Control Board of Pa. v. Eisenberg Farm Prods.*, 306 U.S. 346 (1939); *Penn Dairies, Inc. v. Milk Control Comm'n of Pa.*, 318 U.S. 261 (1943). *See also Nebbia v. New York*, 291 U.S. 502 (1934), upholding New York's minimum milk price control law.

The heart of Petitioners' claim is that the price-setting mechanism of the Milk Marketing Law is protectionist because it precludes out-of-state milk dealers from selling milk in Pennsylvania at prices below the minimum prices set by the Milk Marketing Board, thereby precluding out-of-state dealers from an alleged competitive advantage. Minimum pricing, Petitioners argue, amounts to economic protectionism of Pennsylvania's milk industry. The argument is meritless. Whatever advantage or burden the Law provides to or imposes upon any dealer, those effects accrue equally to in-state and out-of-state dealers.

Unquestionably, whether dealers are efficient or inefficient, such characteristics exist both in-state and out-of-state, and "the fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce." *Exxon Corp. v. Maryland*, 437 U.S. 117, 126 (1978). This issue has been presented to this Court; has been resolved by it; and has been correctly interpreted in review of issues presented by this case in the federal court (*School District of Philadelphia v. Pennsylvania Milk Marketing Bd.*, 877 F. Supp. 245 (E.D. Pa. 1995)), as well as the Commonwealth Court of Pennsylvania (*School District of Philadelphia v. Pennsylvania Milk Marketing Bd.*, 683 A.2d 972 (Pa. Commw. Ct. 1996), *App. Denied*, 694 A.2d 625 (Pa. 1997)).

Petitioners attempt to support their case by claiming that Pennsylvania has higher prices attributable to application of the Law, allegedly demonstrating an inefficiency of Pennsylvania dealers. The argument is devoid of logical or evidentiary support, as demonstrated in the Pennsylvania Commonwealth Court. Since any "protectionism" in the law aids (or burdens) similarly inefficient dealers from any state, the law is geography-neutral. As noted by the United States Court of Appeals for the Third Circuit,

> where the "burden" of out-of-state interests is no different from the placed on competing in-state interests, however, it is a burden on *commerce* rather than a burden on *interstate* commerce.

Norfolk Southern Corp v. Oberly, 822 F.2d 388, 406 (3d Cir. 1987).

The principles set forth above are established and settled principles of law. These principles support the appropriate application of the state's police power under the Milk Marketing Law without unduly burdening interstate commerce. These principles have thus been correctly interpreted by both the U.S. District Court as well as the Pennsylvania Commonwealth Court in their well reasoned opinions cited above.

ARGUMENT

THERE ARE NO CONFLICTS BETWEEN THE OPINIONS OF THE STATE COURT AND THIS COURT OR OF OTHER FEDERAL COURTS WHEN THE STATE COURT CORRECTLY HELD THAT THE PENNSYLVANIA MILK MARKETING LAW EVENHANDEDLY REGULATES THE COMMONWEALTH'S MILK INDUSTRY AND ONLY INCIDENTALLY BURDENS INTERSTATE COMMERCE.

Petitioners are dissatisfied with an Area I pricing order of the Board, resulting from a hearing which afforded ample opportunity for all interested parties, in-state and out-of-state, to participate. Petitioners have been rebuked by the Pennsylvania Commonwealth Court, and the Pennsylvania Supreme Court denied their request for appellate review. They now seek review in this Court essentially to correct perceived errors in the decisions of the state intermediate appellate court, notwithstanding that those decisions are fully supported by the decision of the federal court in *School District of Philadelphia v. Pennsylvania Milk Marketing Bd., supra.* It would be improvident to grant the petition, first, because the state court was correct in its holding under the commerce clause, and second, because the state court's decision is consistent with the commerce clause jurisprudence of this Court and of other federal courts. Petitioners seek to create the appearance of conflicts where none exist and, in so doing, misconstrue the case law and misstate the factual record.

A. The Pennsylvania Milk Marketing Law Evenhandedly Regulates The Price Of Milk Sold In The Commonwealth.

The threshold inquiry in a negative commerce clause analysis is whether the challenged state law discriminates or regulates evenhandedly. *Brown-Forman Distillers*

Corp. v. New York State Liquor Authority, 476 U.S. 573 (1986). When discrimination is manifest in purpose or effect, the state must assume the burden of justifying its actions with reasons unrelated to economic protectionism. *Id.* On the other hand, if the regulation evenhandedly effectuates a legitimate local public interest, and its effects on interstate commerce are incidental, "it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). Thus, in the presence of discriminatory purpose or effect, a state law is presumptively unconstitutional, but in the absence of discrimination, the law is accorded the opposite – a presumption of validity.

As the Commonwealth Court correctly decided, the Milk Marketing Law regulates evenhandedly both on its face and in effect. Pennsylvania's milk regulation has been upheld throughout nearly fifty years of litigation, some of it in this Court and much by other courts under this Court's negative commerce clause analysis. *See Milk Control Board of Pa. v. Eisenberg Farm Prods., supra; Penn Dairies, Inc. v. Milk Control Comm'n, supra; Sylvan Seal Milk, Inc. v. Milk Control Comm'n of Pa.*, 270 F. Supp. 117 (E.D. Pa. 1967); *Milk Control Comm'n v. Rieck Dairy Division of Nat'l Dairy Prods. Corp.*, 193 Pa. Superior Ct. 32, 163 A.2d 891 (1960); *Finucane v. Pa. Milk Marketing Bd.*, 136 Pa. Commw. Ct. 272, 582 A.2d 1152 (1990); and *School Dist. of Phila. v. Pennsylvania Milk Marketing Bd., supra.* The statute has survived intact through every challenge.

In arguing that the statute is facially discriminatory, Petitioners overlook the fact that the statute also directs the Board to establish milk prices after giving all inter-

ested persons reasonable opportunity to be heard. 31 P.S. 700j-801. The statute's definition of "interested person" is geography-neutral, and, in fact, the Board considered the cost of both in-state and out-of-state dealers in establishing the minimum prices for Area I. (App., 6a-7a).

In upholding New Jersey's regulation of milk-pricing, the court in *New York v. Brown,* 721 F. Supp. 629 (D.N.J. 1989), was confronted with statutory language which the State of New York cited as evincing a discriminatory purpose to "salvage the state's dairy industry," much like the language of the Pennsylvania law cited by Petitioners ("the Board . . . shall . . . maintain such prices . . . as . . . will best protect the milk industry of the Commonwealth"). Petition at p. 9. The *Brown* court concluded that it did "not find this statement to evince purposeful discrimination," and noted that the statute, when fairly read in its entirety, "was aimed at protecting New Jersey's milk industry from itself, not from outside competition." *Id.* at 640. The same can be said of the innocuous language cited by Petitioners.

Petitioners cite to *Sylvan Seal, supra,* and proclaim that a "three-judge federal court has already found that the purpose of the milk marketing law is, *inter alia,* to authorize the PMMB to 'protect Pennsylvania processors from . . . out of state businesses.' " Petition, p. 9. Petitioners would mislead the Court into believing that another federal court has found the statute to be facially discriminatory and unconstitutional. The opposite actually occurred in *Sylvan Seal.* The above quote must be read in context: the court actually wrote that "[w]hile [the Commission] may attempt to protect Pennsylvania processors from and help them compete with out-of-state businesses, it must also and in fact has considered the

price structure among this state's milk handlers inter se. Simply because neighboring states may set different prices or have no price controls at all does not require the Commonwealth to abandon its own price system." *Id.* at 121.

It is thus clear that the *Sylvan Seal* court was characterizing the actions of the Milk Control Commission (the predecessor to the current Board); it was *not* declaring the Law to be facially discriminatory. Moreover, the court upheld minimum pricing by the state, having concluded that "there is no substantial constitutional question as to the validity of [the Commission's] present pricing structure for Areas I and I-A" (the same areas at issue in this litigation). *Id.* Finally, *Sylvan Seal* was a due process case; the commerce clause was not invoked. Its citation by Petitioners is, at best, misguided, and at worst, misleading.

Petitioners also claim that the Law evinces an "avowed purpose" to "mitigate the consequences of competition between the states" and is "motivated by an intent to confer a benefit upon local industry not granted to out-of-state industry." Petition at p. 10. This claim is also inaccurate. Petitioners have cited no legislative history, no relevant cases, no reports or studies or any other source whatsoever to ascribe to the Commonwealth such a repressive motive. The line of text which petitioners cull from the statute, to "protect the milk industry of the Commonwealth", amounts to a misleading quote because the statute is facially neutral toward interstate commerce and because, as the record reflects, the Board also observed the requirement that it consider "all conditions affecting the milk industry" (31 P.S. § 700j-801). Procedures followed by the Board afforded out-of-state dealers every opportunity to be heard. It also

included a large out-of-state dealer's costs in the actual calculation of the Area I minimum prices.

Because the Pennsylvania law is non-discriminatory on its face, the next question is whether the statute is discriminatory in its application or effect. The state court correctly decided that it is not.

B. The Pennsylvania Milk Marketing Law Is Non-Discriminatory In Both Its Application And Effect.

Petitioners argue that the law is invalid under this Court's decisions in *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935) and *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186 (1994) because it has a discriminatory effect in purportedly "neutralizing the advantage possessed by lower cost out-of-state producers." Petition at p. 11. Both cases are wholly inapplicable to the facts of this case.

In *Baldwin*, this Court struck down a New York law which required dealers selling milk in-state to pay their producers the New York-mandated minimum prices, even when the dealers acquired their milk outside the state. The Court struck down the law because it had the impermissible effect of projecting New York regulation into another state whose competition was hampering New York producers. Because this scheme explicitly discriminated against interstate commerce, the Court was not required to weigh whether the effects of the discrimination were direct or indirect. The state court here was faced with no such explicit discrimination and thus correcely assessed whether the statute directly or indirectly burdened interstate commerce.

Unlike *Baldwin*, the Pennsylvania law does not project itself into any other state. To the contrary, it merely

establishes a minimum selling price for the various milk marketing areas at which *all participants* in the market must charge. The minimum prices apply to all sellers, whether in or out-of-state. And, to the extent minimum prices are a burden on commerce, they are, in this instance, an equal burden on both internal and interstate commerce. Petitioners assert that out-of-state dealers lose competitive advantages that have accrued to them by virtue of alleged lower costs of production, without citing or adducing any facts demonstrating such competitive advantages. Moreover, all large and efficient in-state dealers are equally affected by the geography-neutral minimum prices, a point which goes to the heart of negative commerce clause analysis.

Similarly, Petitioners' reliance on *West Lynn Creamery* is misplaced, as the Commonwealth Court correctly concluded. In that case, the Court invalidated a Massachusetts pricing order which imposed an assessment on all fluid milk sold by dealers to Massachusetts retailers. Two-thirds of that milk came from out-of-state, but the entire assessment was distributed *only to in-state dairy farmers.* It is in this fact that Petitioners fail to appreciate the main point of *West Lynn Creamery,* namely, that the discrimination which resulted from the distribution of that assessment effectively turned the facially-neutral "assessment" into a tariff. Out-of-state producers were directly subsidizing their in-state competitors. No such subsidy exists in this case.

Petitioners next stumble into their most unfortunate and perhaps most shocking misrepresentation of fact – that the Pennsylvania pricing scheme must fall because it sets prices with reference only to in-state dealers already doing business in the particular milk marketing area.

The Board is required to, and did in this instance, take into account the costs of out-of-state producers in calculating the Area I minimum prices. See 31 P.S. 700j-801. See also *Lily-Penn Food Stores, Inc. v. Pennsylvania Milk Marketing Bd.*, 62 Pa. Commw. Ct. 597, 437 A.2d 485 (1982), which stated: "[d]ealers or handlers marketing milk in an area subject to Pennsylvania law, whether located there or out of state, are directly affected by price-setting orders, and are potential 'interested parties' under Section 801. Participation of a sampling of them in the proceedings is clearly warranted." 437 A.2d at 489. The Board's cross-section for the order under attack by Petitioners consisted of five dealers. Two out-of-state dealers were invited to participate, one of which accepted. (App., 4a). This fact belies petitioners' representation and insinuation that out-of-state dealers' prices are subject to the mercy of in-state dealers. Conclusively, the Board considered the costs of dealers *without* reference to the state in which they happened to be located.

These facts squarely distinguish the Pennsylvania law from that at issue in *Camps Newfound/Owatanna, Inc. v. Town of Harrison, Me.*, 137 L.Ed.2d 852 (1997). There, the Court struck down a facially discriminatory state law that gave preferential tax treatment to charities that serve primarily in-state clients in contrast to charities serving primarily out-of-state clients. The Court likened the Maine tax to the milk assessment in *West Lynn Creamery*, holding that the tax had the effect of an import tariff, though in *Camps Newfound* the tariff was imposed on campers, not goods or commodities. *Id.* at 867. The Court also concluded that the Maine tax law encouraged affected charities to limit their out-of-state clientele. *Id.* at 864.

Unlike statutes in the above cases, the Pennsylvania law does not in any way discourage out-of-state dealers from participating in the Pennsylvania market. Moreover, the Pennsylvania law does not lead consumers to purchase their milk from in-state sellers instead of out-of-state sellers. It is also for these reasons that this case is distinguishable from *Dairymen, Inc. v. Alabama Dairy Comm'n*, 584 F.2d 707 (5th Cir. 1978), where the state implemented a quota system that guaranteed, in perpetuity, that the vast majority of class I milk for sale in Alabama be purchased from existing in-state producers who were already "locked in" to their quota. In this case, there is nothing akin to such quota.

Finally, in fashioning their "discriminatory effect" argument, Petitioners claim that the state court "misread" this Court's decision in *Exxon, supra,* and "exacerbated the similar misreading of that decision by the Third Circuit" in *Norfolk Southern, supra.* Petition at p. 14. Petitioners claim that *Exxon,* where the Court upheld Maryland's prohibition against ownership of gas stations by refiners, is a limited case with narrow application, driven only by the fact that there were no relevant in-state firms on which to base a comparison of discrimination in favor of in-state interests. This characterization of *Exxon* and its progeny by petitioners is erroneous. The fact that this Court *did* examine relative in-state and out-of-state considerations, and coincidentally found no direct interstate competitors (i.e., there were no refiners located in Maryland) itself speaks to the fact that the burdens and benefits on out-of-state and in-state competitors respectively must be examined by any court applying the negative commerce clause principles.

Petitioners also cite to – and dramatically misread – this Court's decision in *C & A Carbone, Inc. v. Clarks-*

town, N.Y., 511 U.S. 383 (1994). Petitioners assert that the regulation there at issue, a flow-control ordinance which required all solid waste to be processed at a designated transfer station before leaving the municipality, was not facially discriminatory. This is incorrect. The Court clearly states that "[a]s we find that the ordinance discriminates against interstate commerce, we need not resort to the *Pike* test." *Id.* at 390. The ordinance at issue in *Carbone* was overtly discriminatory in that it required all non-recyclable solid waste be processed by a single processor. This case was thus much like *Dean Milk Co. v. Madison, Wis.*, 340 U.S. 349 (1951), in that it was a "favored local operator" case. *Carbone*, 511 U.S. at 389. The discriminatory effect on the non-favored operators, including some in-state but *all* out-of-state operators, was central to the Court's holding.

Petitioners' argument stands for the proposition that it is *irrelevant* whether in-state interests are also affected by the allegedly discriminatory regulation in a negative commerce clause analysis. The patent absurdity of this argument can be demonstrated summarily: if the effect of a regulation on in-state interests is irrelevant, how can a court possibly even weigh whether that regulation is discriminatory? Discrimination, that is, economic favoritism on behalf of in-state interests, has long been the hallmark of negative commerce clause analysis. See *Baldwin* and *Pike, supra.* That the Pennsylvania milk pricing scheme affects in-state interests in exactly the same manner as it affects out-of-state interests is the clearest possible evidence that neither the statute's purpose nor its effect is to discriminate against interstate commerce. There is simply no benefit to any in-state interest that comes at the expense of out-of-staters. All are affected, and affected equally.

Economic favoritism and burdens on interstate commerce are the *sine qua non* of invalidity under the negative commerce clause. See *Oregon Waste Systems, Inc. v. Department of Environmental Quality of the State of Oregon*, 511 U.S. 93, 99 (1994), where the Court wrote that discrimination simply means "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." Because the Pennsylvania statute here at issue is even-handed in purpose and effect, there is simply no way Petitioners can demonstrate that in-state dealers and out-of-state dealers are treated or impacted differentially.

To suggest that the equal treatment of in-state and out-of-state interests is irrelevant is a desperate argument by petitioners, who have transparently attempted to manufacture a "conflict" in negative commerce clause jurisprudence where none exists. The principles followed by the Commonwealth Court in this matter are those handed down by this Court and uniformly followed by all federal circuit courts.

C. The Incidental Burdens Of The Milk Marketing Law On Interstate Commerce Are Outweighed By Its Legitimate Local Benefits.

Petitioners assert that the state court erred when it applied the negative commerce clause balancing test and concluded that the statute's local benefits outweigh its effects on interstate commerce. More specifically, petitioners claim that the local benefits considered by the state court have been "classified as illegitimate" by this Court. Petitioners have against misapplied this Court's teachings. The cases they cite are all overt discrimination cases, *not* balancing test cases. There-

fore, the local interests that were purportedly "classified as illegitimate" by this Court were, in reality, being measured against the *per se* rule of invalidity, *not* against the presumption of validity underpinning the balancing test. As this Court is well aware, nearly *any* proffered local justifications will fail when the Court is applying the *per se* rule of invalidity, which does not apply in this case in the absence of discriminatory purpose, application or effect of the Pennsylvania law.

Petitioners cite first to *New Energy Co. v. Limbach*, 486 U.S. 269, 273-74 (1988) for the proposition that the state's justification for its law must be "unrelated to economic protectionism." Petition at p. 18. In context, the cited quotation simply states the well-known rule that state statutes which clearly discriminate against interstate commerce are routinely struck down, unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism. 486 U.S. at 274 (citations omitted). Petitioners are thus incorrect in ascribing error to the state court on these grounds, because the state court was properly applying the balancing test, not the *per se* rule of invalidity. Petitioners cite *Baldwin* for a similar proposition, but that case also involved clear discrimination and *per se* invalidity of a state law.

When applying the balancing test, as the Commonwealth Court properly did, the presumption is in favor of the validity of the statute or regulation. Thus, the state is not required to justify its regulation under the most exacting scrutiny of the *per se* rule of invalidity. The reviewing court may properly consider the economic rationale that underlies the rule, as well as the other reasons reflected in the record – namely, protecting the public interest, insuring a sufficient quantity of pure and

wholesome milk to the inhabitants of the Commonwealth, and paying special regard to the health and welfare of the children residing in Pennsylvania. 31 P.S. §700j-801.

Finally, the Pennsylvania Milk Marketing Law places only incidental burdens on interstate commerce, which are more than outweighed by the legitimate and reasonable benefits of the statute. As the court held in *United Dairy Farmers Cooperative Ass'n. v. Milk Control Comm'n. of Pa.*, 335 F. Supp. 1008, 1014 (M.D. Pa. 1971), *aff'd*, 404 U.S. 930, Pennsylvania's minimum pricing law "(does) not burden but (has) only an incidental effect on interstate commerce which would not prevent Pennsylvania from pursuing its legitimate goals." The state court reached a similar conclusion on similar grounds and committed no error of constitutional dimensions warranting a writ of certiorari by this Court.

CONCLUSION

Certiorari is not warranted. The Pennsylvania Commonwealth Court correctly applied uniform governing precedent of this Court and conforming holdings of other federal and state courts in finding that the Pennsylvania Milk Marketing Law does not discriminate against interstate commerce in administration of a statute found by this Court to be an appropriate exercise of the Commonwealth's police power. For the reasons set forth above, Respondents respectfully request that this Court deny Petitioners' Petition For Writ Of Certiorari.

Respectfully submitted this 22nd day of September, 1997.

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APPENDIX

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS BEFORE THE PENNSYLVANIA MILK MARKETING BOARD (June 1995)

[500] Q. You mentioned to me that the adults who buy this milk tend to be kind of a coffee klatch group. Could you explain that to the Board how that works?

A. Well, I think many of our sales of half pints to the adults are for their coffee – little coffee pool, coffee pool, something. It's not really essentially for their own consumption.

Q. Now, let me ask one more question in that area. When you resell the milk in those limited situations, what is the price or the price range that you resell it?

A. It's 35 cents a half pint to the students and, by regulation, I believe it's 40 cents to adults.

We must charge something more for the adults than we charge for the students.

Q. How did you arrive at those prices for your .05 percent of resale?

A. Our standard markup for over the counter sales of any food product is 100 percent, so the 35 cents would equate to 17-½ cent cost on milk.

* * *

[502] rest of our talking about is the 99.95 percent of your milk purchases that you use in the school lunch program, school lunch and school breakfast program.

You mentioned that the federal government reimburses you for these various meals. Can you explain to the Board what the reimbursement rates are and in what proportions they occur and on what basis?

A. The National School Lunch Program provides free or reduced price meals to students. Eligibility for those meals is determined by the student's household income and size.

In Philadelphia – oh, I'm sorry – in addition, if a child does not qualify for free or reduced meals, they will be forced to pay the full price of the meal, the platter, in Philadelphia. And that's $1.50.

The government has a three-tiered reimbursement rate for both lunch and breakfast.

Q. Just to clarify, you're discussing just the federal government?

A. Federal government, right. The [503] State, and I can explain that if you wish?

Q. Do the fed first and then we'll do the state. I think it's easier that way.

A. Okay, as I go through each one, why don't I give you the federal and the state and then give you a total?

Q. Okay.

A. So there's three tiers and the federal government reimburses us so much for a free meal, whether breakfast or lunch, so much for a reduced price meal, and they even give us a reimbursement for meals of children who pay full price.

For breakfast, the federal government gives us $1.16 for each child who is determined to be in the free category, the state chips in ten cents, so we get $1.26 for every free breakfast we serve.

For a child who pays a reduced price, the government gives us less 86 cents for a breakfast, the federal government, the state continues the 10 cent reimbursement, so we get 96 cents for breakfast.

If a child pays the full price, the [504] federal government gives us 19 cents, and the state, again, gives us ten cents. So that's 29 cents for breakfast reimbursement.

For lunch it's higher. A child who receives a free lunch is claimed for $1.78 from the federal government.

The state gives us approximately eight cents. It can vary depending on the special incentive that the state has, which is very esoteric. I'll explain it if you want, but it's between eight cents and ten cents.

So the total reimbursement for a free lunch from the federal government is $1.86. I'm sorry, $1.78 and eight cents, so the total reimbursement is $1.86.

For a reduced price lunch, the federal government provides us $1.38, the state, again, eight cents; $1.46 for a reduced price lunch.

And if a child pays the full price for lunch, the federal government gives us 19 cents and the state gives us eight cents, so we get 27 cents for a fully paid lunch.

Q. Now, have you – are you aware that

* * *

[509] A. Approximately 18 cents.

Q. Now, that would mean then that milk accounts for, depending on the meal, 15 percent to 30 percent of your food cost, is that correct?

A. That's correct.

MR. TORTORICE: If you could indulge me, I missed the numbers with respect to cost of food for lunch.

THE WITNESS: The cost of food for lunch in the heat and eat program is 95 cents, and in the full service program, it's 72 cents. That's food cost.

MR. TORTORICE: Thank you.

BY MR. SCHNURER:

Q. Now, if the milk prices you pay is raised or is higher than it might otherwise be, what effect does that have on the school district and its meal programs?

A. Well, on the expense side, of course it adds to cost. So without an increase in revenue, which we won't get resulting from the increase in the price of milk from the federal government, and absent an increase in

* * *

[878] market are represented.

We also review the delivery types specifically to ensure that the deliveries are representative as that is a key issue in developing a price.

We feel that the cross section selected is highly representative.

BY MS. ULRICH:

Q. Could you go into just briefly the process of selecting these dealers and how that process culminates in the petitioning dealers using the same cross section as does the Board?

A. As I said, we review a listing of dealers that sell into the area, review the quantities of milk sold in to first ensure that it's representative in that way. That would be our first selection process.

In the case of the Area 1 cross section, we had initially selected Cumberland Farms to participate in the cross section.

We received very strong objection from Cumberland Farms to being in the cross section and we wanted representation from out of state, knowing that Area 1 is a highly [879] competitive area and that the New Jersey influence should not be overlooked.

To replace Cumberland, we then selected Readington Farms in New Jersey, knowing that they are a large efficient dealer and would represent well the out-of-state influence.

Also, we wanted to make sure that the delivery types were representative, so we looked at a non-processor in the area and saw that they had significant deliveries in the area and also included in our cross section Balford.

And these decisions were communicated to the Milk Dealers Association, Carl Herbein, in particular. He concurred with our judgment on that and they became cross section dealers.

Container Costs – produced and marked for identification as Staff Exhibit No. 1.

BY MS. ULRICH:

Q. Let's move on then to your exhibits.

Looking at your pre-submitted Exhibit 1, would you please take us through that

* * *

[904] in sizes or types of containers without a price may be used until authority is granted by the Board.

Would you have any comment with regard to the Board's considering a possible revision of that particular provision?

A. Since it is Board policy to encourage milk sales and to the extent that new types of containers may promote that, any revision of that language which would make it easier to introduce new types of containers to the marketplace would be positive and we would endorse such a revision

Q. Finally, just one more question.

Again, referring to Mr. Herbein's testimony, he was asked on cross examination what effect significant reductions in prices would have on the marketplace and on consumer behavior.

How would you answer that same question?

A. Knowing that the market price for milk, the MW price, fluctuates significantly throughout the year, we are aware that [905] consumption patterns do not mirror those changes significantly, so that we would say that consumption patterns are not overly affected by changes in pricing.

It takes just as much milk to put on your Cheerios if it's $2.00 a gallon as $2.10. So, we think that milk is relatively inelastic and thus the price is exorbitant.

MS. ULRICH: Thank you.

That concludes my direct examination, Mr. Chairman.

MR. DERRY: Thank you.

Cross examination, Don?

CROSS EXAMINATION

BY MR. TORTORICE:

Q. Mr. DeSantis, with respect to the costs that are set forth in the various exhibits of Staff, do you have an opinion as to whether the range of costs exhibited by the cross section for Area 1 is typical or atypical of costs generally of dealers in Area 1?

A. We believe those costs to be typical.

Q. Therefore, you would find them,

* * *

[961] gallon equivalent using your weighted average cost than three of the four dealers actually incurred during 1994.

Would you consider that to be an unintended profit for the dealers if the dealer's costs or even your cost gets used as one of the bases to formulate a minimum price order?

A. Not at all. The reason for that answer is that with the cross section mentality, some dealers will win, some dealers will lose.

The dealer with the higher costs will not fully recover those costs. His costs should be represented and they are a significant part of the sales in the cross section, and should not be ignored.

So, we think that is entirely proper to put those in there and we strenuously resist any deletion of high cost dealers or low cost dealers from the cross section.

We believe the cross section we picked is the correct cross section.

Q. That all depends on whether or not the cross section is representative of [962] something. It's got to be representative of something, correct?

A. We believe the cross section we selected is representative of milk marketing in Area 1, period.

Q. I haven't cross-examined on that yet.

All right, let's continue.

I've now finished with the first two pages of Exhibit 1. Exhibit 1 has a third page. The first thing it says half pint – oh, I see.

A. The last page is simply the total, what remains of the total.

Q. Of the five or with half pint?

A. Right.

Q. But you only have half pint. In my last page, you don't have anything else.

I'm sorry. It starts at the bottom of page 2, right?

A. Right.

Q. 92.2 and so forth?

A. Right.

Q. And those figures would be the same

* * *

Supreme Court, U.S.
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No. 97-327

In The

Supreme Court of the United States

October Term, 1996

CONSUMERS EDUCATION & PROTECTIVE ASSOCIATION, AND LANCE HAVER,

Petitioners,

v.

PENNSYLVANIA MILK MARKETING BOARD, LEHIGH VALLEY DAIRIES, INC., ATLANTIC DAIRY COOPERATIVE, PENNSYLVANIA ASSOCIATION OF MILK DEALERS, ROSENBERGER'S DAIRY, INC., CLOVER FARMS DAIRY, AND WAWA DAIRY,

Respondents.

On Petition For A Writ Of Certiorari To The Commonwealth Court Of Pennsylvania

REPLY BRIEF

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DATED: September 29, 1997

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REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Before moving to the central question posed by this Petition for Certiorari, it is important to clear up a few factual errors made in Respondents' briefs.

1. The answering Respondents, all of them milk dealers, begin by asserting that it is the *School District* who is in the business of selling milk for exorbitant profit. While Respondents suggest that the per-meal reimbursements received by the School District greatly exceed the "cost for food" for such meals, *Brief of Respondents Lehigh Valley Dairies, Inc., et al.* (hereinafter *Milk Dealers' Brief*) at 2, they fail to note the *non-food* costs, e.g., labor and overhead, which, the Food Services Director testified, can run more than double the cost of the food. Moreover, the School District's for-profit milk sales constitute only about 0.05% of the District's annual milk volume, consisting almost entirely of market-price sale to employee groups for use in their coffee. *See id.*, App. at 1a. Almost all the rest is, indeed, "given away."

2. Respondents deny that "milk prices are truly contributing to any condition of economic extremis for the School District of Philadelphia." *Id.* at 3. It is self-evident, however, that the School District could spend more money on *education* – according to the record, $1 million per year, R. 281a – if it could spend less on milk at inflated prices.

3. Respondents next assert that "[i]t is . . . appropriate to point out that the School District of Philadelphia has not filed any brief in support of the Petition." *Milk*

Dealers' Brief at 4. As the Respondents themselves concede, however, *id.*, the School District was dismissed from similar prior federal litigation, *School District of Philadelphia v. Pennsylvania Milk Marketing Board ("SDP")*, 877 F. Supp. 245, 254 (E.D. Pa. 1995), on the ground that, as a state instrumentality, it lacked standing to sue the state for constitutional violations in federal court, which would similarly apply to its standing in *this* Court. That said, it is "appropriate to point out" that neither the state agency nor the state itself, but only a bevy of milk industry interests, has filed any brief in this Court in support of the state's own statute.

Let us now turn to Respondents' understanding of the law.

The Respondents argue primarily that the Pennsylvania Milk Marketing Law has repeatedly been upheld by the courts. *Milk Dealers' Brief* at 6, 9; *Brief of Respondent Atlantic Dairy Cooperative in Opposition* at 4. But even they must concede that the vast bulk of these decisions did not involve commerce clause challenges. *See Milk Dealers' Brief* at 11 ("the commerce clause was not invoked"). Respondents' citation to *Nebbia v. New York*, 291 U.S. 502 (1934), *see Milk Dealers' Brief* at 6, is the most glaring example: *Nebbia* was not a commerce clause challenge at all. When such a challenge was brought nine months later, the statute was struck down. *Borden's Farm Products Co. v. Baldwin*, 293 U.S. 94 (1934).

In fact, only *three* of the cited cases involve the commerce clause – and the two from Pennsylvania district courts are not at all in accord: Despite Respondents' insinuation to the contrary, *id.* at 6, the Eastern District in

SDP, supra, clearly did *not* follow the Middle District's rather summary commerce clause treatment in *United Dairy Farm Cooperative Ass'n v. Milk Control Comm'n of Pa.*, 335 F. Supp 108 (M.D. Pa. 1971), finding instead that precedent of this Court "would seem to support Plaintiffs' theory that the instant regulations do impose burdens on interstate commerce." *SDP,* 877 F. Supp. at 252.

Moreover, while this Court upheld Pennsylvania milk control law against a commerce clause challenge in *Milk Control Board of Pa. v. Eisenberg Farm Products,* 306 U.S. 346 (1939), *Eisenberg* turns primarily on the fact that only "a small fraction of the milk produced . . . in Pennsylvania is shipped out of the Commonwealth." *Id.* at 353. As discussed in the Petition, however, the milk industry has changed tremendously since 1939, so that "local" price regulations now have significant effects on interstate trade, with "fully 55% of the milk [from the Philadelphia area] distributed outside the state." *Lily Penn Food Stores v. Milk Marketing Board,* 437 A.2d 485 (Pa. Cmwlth. 1981). *Eisenberg's* relevance to, and continued vitality in, the modern interstate milk market is thus highly dubious. *Eisenberg* is also explicable – and thus easily distinguishable – on the ground that the precise issue presented involved, in stark contrast to *this* case, Pennsylvania's *disadvantaging* of its own produce in interstate shipment. *Cf.* L. Tribe, AMERICAN CONSTITUTIONAL LAW (2d ed. 1987) at 408 *et seq.* (burdening of in-state economic interests generally not the focus of constitutional concern).

That makes crucial the accurate statement of the issue posed by this case. Petitioners do *not* make the "shocking" assertion "that the Pennsylvania pricing scheme must fall because it sets prices with reference

only to *in-state* dealers already doing business in the particular milk marketing area." *Milk Dealers' Brief* at 13 (emphasis added). What Petitioners *do* assert is that "[t]he minimum price below which no-one may sell milk in Pennsylvania is derived by reference to *only* milk distributors *already doing business* in the particular 'milk marketing area' in question *in Pennsylvania.*" Petition for Certiorari at 11-12 (emphasis in original). Those *"already doing business"* in the state do include some *non*-domestic businesses (although not many, as indicated by the fact that PMMB's supposedly representative cross-section included only *one* out-of-state dealer). Such businesses are "out-of-state" in the sense of having their processing operations or domicile out-of-state – but those few are necessarily already *operating* in the in-state market, or, by law, they could not be included in the minimum price calculation.

Petitioners contend that this discriminates in favor of those *already operating in the Pennsylvania market* (the vast bulk of whom are Pennsylvania firms) and against those *not already operating in the Pennsylvania market* (all of whom are, by definition, *non*-Pennsylvania firms), by denying the latter "outsiders" the ability to come into the market from out-of-state and "peel off" market share by selling at a lower price – what this Court's jurisprudence has repeatedly emphasized is the core requirement of the commerce clause. *See, e.g., West Lynn Creamery v. Healy,* 512 U.S. 186, 193 (1994); *Brown-Forman Distillers v. New York State,* 476 U.S. 573, 580 (1986).

If Petitioners accurately describe the statute, then one would predict two effects: (1) Prices would tend to be higher, which, as discussed in the Petition for Certiorari,

is in fact the case. (2) Despite the interstate nature of today's milk market, "outsiders" would tend to *remain* "outsiders," resulting in relatively few out-of-state firms gaining significant Pennsylvania market share, which, as just mentioned, *also* happens to be the case. This propensity to exclude those *already outside the market*, who necessarily happen *all* to be out-of-staters, to the benefit of those *already in the market*, who are likely to be *in*-staters, renders this egregious law unconstitutional under the commerce clause.

Accurately stated, then, it is Petitioners' contention that, while the Pennsylvania Milk Marketing law may not *explicitly* either discriminate against out-of-staters or base price calculations expressly upon only domestic firms, *per se*, it does indeed do so more subtly. As this subtle discrimination is built into the statute (*see* 31 P.S. sec. 700j-801 ("producers, dealers and stores *in the area*") (emphasis added)), it is thus "facial," for it cannot be the law that a statute evades facial invalidity by simply avoiding use of the words "in-state" and "out-of-state" while, by design, effectively employing that very distinction.

It is in fact the subtleness of the discrimination that makes this case important: This Court need not be particularly vigilant to catch states that attack interstate commerce with a meat cleaver. It must, however, stand alert – and send clear warnings – to those states that try stealthily to eviscerate free trade with a stiletto. That is why this Court ought to grant the writ and reverse the judgment below.

Respectfully submitted,

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